80-1322

No.

Office-Supreme Court, U.S.
FILED
FEB 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARIA EMILIA FAMILIA de BOOM, et al.,
Petitioners,

versus

AROSA MERCANTIL, S.A., et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether a United States District Court has sufficient "jurisdiction to determine jurisdiction" to enable it to enforce discovery orders directed to jurisdictional issues.

II. Whether a United States District Court exercising its federal question or admiralty jurisdiction is limited by personal jurisdiction concepts derived from forum-state law and the Fourteenth Amendment.

III. Whether the decision below, denying federal court authority to enforce discovery orders against defendants challenging personal jurisdiction, conflicts with the deterrence policy set forth in this Court's decisions in *National Hockey League v. Metropolitan Hockey Club* and *Roadway Express v. Piper.*

IV. Whether denying a federal admiralty court the power to enforce discovery orders against foreign shipowners challenging the court's jurisdiction conflicts with this Court's decisions in *Swift & Co. Packers v. Compania Columbiana del Caribe* and *Hellenic Lines v. Rhoditis.*

V. Whether the principle of *United States v. United Mine Workers of America* supports the validity of discovery sanctions against defendants contesting federal court jurisdiction.

LIST OF ALL PARTIES AS REQUIRED BY SUPREME COURT RULE 21.1(b)

The undersigned counsel for Maria Emilia Familia deBoom, et al, petitioners, certifies that the following were the parties to the proceeding below.

Maria Emilia Familia de Boom, spouse of decedent Hugo Boom Martinez, Individually as personal representative of the Estate of Hugo Boom Martinez and as natural tutrix of the minor children, Candida Rosa Boom Familia, Narcisco Ulises Boom Familia, Carlos Miguel Boom Familia and Miguel Antonio Boom Familia, and Carlos Eusebico Boom Familia; Alejandrina de Leon Garcia, Individually and as personal representative of the estate of Luis Felipe Astacio and as natural tutrix of the minor child, Julia Cecilia Astacio; Ramonita Mendez as natural tutrix of the minor child, Santa Bienvenida Mendez; Pastora Guillaudeaux, Individually and as personal representative of the Estate of Geronimo Encarnacion Figuereo, deceased, and as natural tutrix of the minors, Virginia Cipriano Encarnacion Guillaudeaux, Cayetano Miguel Encarnacion Guillaudeaux, Pablo Francisco Encarnacion Guillaudeaux and Aidonais de Jesus Encarnacion Guillaudeaux; Olga Hernandez, Individually and as personal representative of the estate of Ramon Antonio Carrasco Nolasco, deceased, and as natural tutrix of the minors, Adalgisa Carrasco, Xionara Carrasco, Miguelina Carrasco, July

Carrasco, Francia Carrasco, Roberto Carrasco, Carlitos Carrasco, Soraya Carrasco, Antonio Ramon Carrasco and Ramon Antonio Carrasco; Carmen Nolasco; Ercelina Marcelino, Individually and as personal representative of the estate of Jose' Laluz Martino Sabino, deceased, and as natural tutrix of the minors, Maria Margarita Marcelino, Eduardo Marcelino, Alejandrina Marcelino, Porfirio Marcelino and Jose Marcelino; and Maria Sabino de Martino; Juana Mercedes, Individually and as personal representative of the estate of Roberto Cruz, deceased, and as natural tutrix of the minors, Alodia Elsinidia Cruz Mercedes, Edy Mercedes Cruz Mercedes, Angel Wilfredo Cruz Mercedes, Joseline Mercedes Cruz Mercedes, Elsa Yolanda Cruz Mercedes, Jose Roberto Cruz Mercedes and the posthumous child of the decedent, and Rosa Cruz; Fatima Augustina Monegro Burgos Santana, spouse of the decedent Ramon Santana Babi, Individually, and as natural tutrix of the minor, Ramona Santana Monegro, and Victoria Santana; Eusebia Astacio, as dependent mother of the decedent, Luis Felipe Astacio; Orfelina Maria Mercado Leazard, as surviving wife of the decedent, Leon Leazard Chevalier, as personal representative of the estate of said decedent, Miguelina Jocelin Leazard Mercado and Jocelin Miguelina Leazard Mercado; Freddys Ramon Leazard Mercado, Juan Duff Leazard Mercado, Mercedes Altagracia Leazard and Socrates Man-

uel Leazard Mercado, sue herein individually and as dependent major children of the decedent, Leon Leazard Chevalier; Altagracia Chevalier Leazard as dependent mother of decedent, Leon Leazard Chevalier, Rosa Maria Tavarez, as surviving wife of decedent, Eduardo Tavarez Abreu, and natural tutrix of the minor, Eduardina Tavarez Abreu; Joaquin Salador Facundo Melo, a member of the crew of the S/S UKOLA at the time of her sinking.

— Plaintiffs-Appellees-Petitioners

Arosa Mercantil, S.A. and Inversiones Calmer, S.A.

— Defendants-Appellants-Respondents

David W. Robertson
Attorney for Plaintiffs-
Appellees-Petitioners

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MARIA EMILIA FAMILIA DE BOOM et al.,
Petitioners,

versus

AROSA MERCANTIL, S.A. et al.,
Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Maria Emilia Familia deBoom et al., the petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on November 7, 1980. That Court denied petitioners' timely petition for rehearing and rehearing en banc on December 17, 1980.

OPINIONS BELOW

The November 7, 1980, opinion of the Court of Appeals, whose judgment is here sought to be reviewed, is reported at 629 F.2d 1134, and is reprinted in the attached Appendix "A" to this Petition, pp. 1a-13a. The December 17, 1980, order of the Court of Appeals denying petitioners' petition for rehearing or rehearing en banc is not reported; it is reprinted in the attached Appendix "B" to this Petition, pp. 13a-14a. The prior decrees and orders of the United States District Court for the Southern District of Texas (of March 8, 1978; May 9, 1978; November 17, 1978; December 26, 1978; and March 6, 1979) are unreported. They are set forth in the attached Appendix "D" to this Petition at pp. 23a-90a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1980. A petition for rehearing and rehearing en banc was denied on December 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced verbatim in the attached Appendix "C" to this Petition, pp. 14a-22a.

U.S. Const., Amend. V
U.S. Const., Amend XIV, §1

Fed. R. Civ. P. 37(a)
Fed. R. Civ. P. 37(b)
Fed. R. Civ. P. 4(d)(7)
Fed. R. Civ. P. 4(e)
Tex. Rev. Civ. Stat. §2031b

STATEMENT OF THE CASE

Petitioners seek certiorari to review a decision and opinion of the United States Court of Appeals for the Fifth Circuit, which reversed a default judgment on the issue of liability rendered in petitioners' favor by the United States District Court for the Southern District of Texas. Jurisdiction in the district court was based on 28 U.S.C. §1333. The district court imposed the default judgment as a sanction pursuant to Fed.R.Civ.P. 37(b)(2)(C), after defendants, who appeared to contest personal jurisdiction, repeatedly violated the court's discovery orders. The Court of Appeals found that the district court's discovery orders were valid and that defendants' violations of those orders were "flagrant" and "contumacious", but nevertheless concluded that the sanction imposed was invalid because of its view that full proof of personal jurisdiction and service of process under Texas law and the Fourteenth Amendment were prerequisite to the validity of discovery sanctions. Both the result and the reasoning of the Court of Appeals raise important questions of federal court jurisdiction and procedure.

The Facts[1]

This was a maritime personal injury and wrongful death case, arising out of the sinking of the M/V UKOLA. On January 19, 1977, that vessel, bound from the Dominican Republic to Galveston, Texas, with a cargo of sugar, sank approximately 200 miles west of Key West, Florida, in the Gulf of Mexico. Vessel, cargo, and 20 of 23 crew members were lost. Plaintiffs in this action were a surviving crew member and the personal representatives of a number of deceased crew members. Defendants[2] were two Panamanian corporations — Arosa Mercantil, S.A. ("Arosa"), the vessel's owner, and Inversiones Calmer, S.A. ("Inversiones"), the charterer[3] and operator of the vessel.

Arosa acquired ownership of the UKOLA on or about June 18, 1976 (R. 157). She became a Panamanian-flag vessel (*id.*). Arosa was a single-ship corporation, owning only this one vesel (R. 158). During all of the time UKOLA was owned by Arosa the vessel was

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1 References to the record in this Petition ("R. ____") are to the record lodged in the Court of Appeals.

2 A third defendant, Farovi Shipping Company, was not involved in the appeal to the Fifth Circuit and is not involved in the present Petition. (The default judgment against the other two defendants was made a final judgment by order of the district court pursuant to Fed. R. Civ. P. 54(b), March 6, 1979. See Appendix "D" to this Petition, pp. 88a-90a.

3 Defendants' answers to interrogatories, R. 153, R. 175, do not clarify the type of charter. Defendants' memorandum supporting their motion to dismiss states time charter at one place, R. 128, bareboat charter at another, R. 133.

chartered to Inversiones (R. 157). Arosa and Inversiones had the vessel for only seven months before the sinking that gave rise to this lawsuit.

During the 29-month period immediately preceding Arosa's acquisition of the UKOLA, the vessel had made at least six voyages to Texas ports (R. 159, 180). During the seven months of defendants' control of the vessel, she made at least seven voyages to United States ports,[4] at least two of them to Texas.[5] In December, 1976, UKOLA's owners appeared before the General

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4 UKOLA's relatively extensive contacts with the United States during Arosa's period of ownership are shown by Lloyd's Register materials made an appendix to petitioners' Petition for Rehearing and Rehearing En Banc to the Fifth Circuit. Petitioners are respectful of the normal practice prohibiting reference to facts outside the record. However, under the highly unusual circumstances of the present case, petitioners respectfully request the Court to consider the totality of the factual circumstances made reasonably to appear in order to avoid doing serious injustice to petitioners and leaving plaintiffs and trial courts generally in a complete quandary as to the efficacy of discovery against defendants who choose to resist jurisdiction. It should be noted that there was never any occasion for petitioners to make a jurisdictional record because defendants' maneuvers prevented the case from reaching a stage at which a jurisdictional hearing could be had.

5 The record shows at least two voyages to Texas. (R. 128). The panel opinion is mistaken in stating that only one was shown (629 F.2d at 1139). Defendants in a Memorandum in support of their motion to dismiss the action conceded "previous voyages of the M/V UKOLA to Texas," (R. 133), "occasional and sporadic voyages of the M/V UKOLA to Texas shores," (R. 135), "random calls at state ports," *(id.)*, "calls made by the M/V UKOLA to Houston and Galveston," (R. 136), and "while more than one voyage is involved in this case, the voyages [to Texas] were only occasional and sporadic." (R. 137).

Consul of Panama in New Orleans to renew and extend the vessel's registry (R. 63).

The present action was commenced on February 11, 1977. Both defendants were served with process pursuant to Fed.R.Civ.P. 4 and the Texas "long-arm" statute, Tex.Rev.Civ.Stat. §2031b (R. 11, 103, 107). [Certificates of the Texas Secretary of State showing compliance with the procedures of the Texas statute were appended to petitioners' brief as Appellees in the Fifth Circuit. For reasons that will appear herein, these certificates did not become part of the trial court record.]

After considerable delay, both defendants filed motions to dismiss under Fed.R.Civ.P. 12(b), attacking subject matter jurisdiction, jurisdiction over the person, venue, and service of process. The trial court determined that these motions could not be decided until plaintiff had the opportunity for adequate discovery of jurisdictional facts and issued appropriate orders under Fed.R.Civ.P. 37(a) to effectuate that discovery.[6]

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6 The trial court did not order the jurisdictional discovery without basis for the belief that the requisite contacts could be shown. At a September 14, 1977, hearing, the trial judge questioned plaintiffs' counsel about probable jurisdictional contacts, and elicited that counsel's preliminary investigation had indicated previous voyages of UKOLA to Texas, an apparent agency relationship between the vessel's owners and operators and Gulf Coast Shipping Corporation of Houston, and that the equitable owners of the Arosa corporation were permanent resident aliens in the United States (1st Supp. Record, Vol. II, Tr. of Hearing of September 14, 1977, pp. 10-11). Further colloquy on that subject occurred at a May 9, 1978, hearing, with plaintiffs' counsel informing the Court that investigations suggested that Farovi Shipping Corporation of Miami and an American citizen in Puerto Rico, Mr. San Miguel,

When defendants repeatedly failed and refused to comply with the court's discovery orders, plaintiffs moved for sanctions under Fed.R.Civ.P. 37(b). Determining that defendant's refusals to obey discovery orders were inexcusable, the court imposed the Fed.R.Civ.P. 37(b)(2)(C) sanction of default judgment on the issue of liability against defendants. The initial default was "interlocutory", giving defendants the opportunity to come forward with the requested information. But neither defendant ever made any effort at any time to answer the interrogatories satisfactorily to the court. Nor did either defendant offer any justification for the repeated refusals to comply with the discovery orders.

The defendants' jurisdictional motions never became ripe for consideration by the trial court because defendants never permitted the discovery deemed necessary by the court for reasoned consideration of those motions. Therefore, plaintiff had neither occasion nor opportunity to make a record on those issues.

After a full trial on the damages issues, in which defendants fully participated, judgment was rendered for plaintiffs and made final pursuant to Fed.R.Civ.P. 54(b). Defendants then appealed to the Fifth Circuit.

The details of the course of proceedings in the trial court are important to understanding of the Fifth Cir-

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had ownership interests of some kind in the vessel. (1st Supp. Record, Vol. I, Tr. of Hearing of May 9, 1978, pp. 16-17). Plaintiffs needed discovery to establish or negate those facts, and defendants' refusals to obey the court's discovery orders prevented that discovery.

cuit's decision. A summary chronology of those proceedings is made Appendix "E" to this Petition at pp. 90a to 98a.

The Decision Below

On defendants' appeal from the default judgment entered as a sanction under Fed.R.Civ.P. 37(b)(2)(C), the Court of Appeals for the Fifth Circuit had no doubt that the trial court's discovery orders were valid, 629 F.2d at 1137.[7] The Court also found that defendants' violation of the court's discovery orders had been "flagrant" (*id.* at 1137 n. 4), and "contumacious" (*id.* at 1139); that plaintiffs had been prevented from proving jurisdiction over the person (*id.* at 1138) and the elements of valid service of process under the Texas statute (*id.* at 1139) by defendants' refusals to obey discovery orders; and that the absence of sanctions powers would leave the "district judge in a quandary in trying to enforce his discovery order" (*id.*). Nevertheless, the Court held that the Fed.R.Civ.P. 37(b) sanction imposed was invalid because the court below lacked jurisdiction sufficient to order such a sanction. The opinion *assumes* that personal jurisdiction over defend-

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7 Many cases support the proposition that, under identical circumstances, it would be error for the trial court to refuse to order defendants to comply with jurisdiction discovery. *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir. 1980); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430-31 (9th Cir. 1977); *Fraley v. Chesapeake & Ohio Ry. Co.*, 397 F.2d 1, 3 (3d Cir. 1968); *Surpitski v. Hughes-Kennan Corp.*, 362 F.2d 254, 255-56 (1st Cir. 1966); *Davis v. Asano Bussan Co.*, 212 F.2d 558, 564-65 (5th Cir. 1954); *Urquhart v. American-La France Foamite Corp.*, 144 F.2d 542, 544 (D.C. Cir.), *cert. den.*, 323 U.S. 783 (1944). See also 4 Moore's Federal Practice, ¶ 26.56[6].

ants was a requisite to the validity of the discovery sanction:

> The issues on appeal are: 1) whether the district court had personal jurisdiction over the defendants upon which to base the default judgment . . . . 629 F.2d at 1136.

The opinion does not discuss why the "jurisdiction to determine jurisdiction" concept, deemed broad enough to support the district court's orders issued under Fed. R.Civ.P. 37(a), was not broad enough to support enforcement of those orders through appropriate sanctions under Fed.R.Civ.P. 37(b). Concluding that plaintiffs — concededly because defendants evaded discovery — had failed to show minimum contacts with Texas sufficient to satisfy Texas law and the due process requirements of the 14th Amendment, the Court determined that the discovery sanction must fall:

> This leaves the district judge in a quandary in trying to enforce his discovery order, but that is a necessary result of the limitations of sovereignty under due process. 629 F.2d at 1139.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Resolve A Conflict Among The Courts of Appeals On Whether "Jurisdiction to Determine Jurisdiction" Will Support Discovery Sanctions Against Defendants Challenging Federal Court Jurisdiction.

When the Court of Appeals in the present case determined that the district court's "jurisdiction to determine jurisdiction"[8] (629 F.2d at 1137) was broad enough for discovery orders under Rule 37(a) but not broad enough for discovery sanctions under Rule 37(b), it left "the district judge in a quandary in trying to enforce his discovery order" (*id.* at 1139), put petitioners in a genuine "Catch-22" situation,[9] encouraged defendants challenging federal court jurisdiction to resist discovery, and placed itself in square conflict with decisions of the Courts of Appeals for the Fourth and Eighth Circuits.

Lekkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971), was a maritime personal injury suit in which a Panamanian shipowner appeared in the United States District Court to contest subject matter jurisdiction, but refused to respond to discovery seeking information on the jurisdictional issues raised. The district

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8 On "jurisdiction to determine jurisdiction", see generally 13 Wright & Miller, Federal Practice and Procedure §3536.

9 Under traditional reasoning and as pointed out by the Fifth Circuit herein, plaintiff must prove personal jurisdiction when defendant challenges it. However, that burden is not insuperable because discovery is available on the jurisdictional question raised. Yet the Fifth Circuit has determined that a defendant who resists such discovery can not be subjected to sanctions — i.e., that discovery orders can not be enforced — because personal jurisdiction has not been proved. See Judge Oakes' dissent in *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 455-56 n. 1 (2d Cir. 1975), *cert. den.*, 423 U.S. 1052 (1976), terming a much less egregious limit on jurisdiction discovery a "Catch-22 situation." (At that point Judge Oakes cited *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971), discussed *infra*.)

court granted defendant's motion to dismiss for lack of jurisdiction, and the Court of Appeal reversed, emphasizing that the district court had the authority and the duty to secure discovery, and that, if defendants did not promptly produce the required information, the court

> should apply sanctions under Fed.R.Civ.P. 37, and for the purposes of this case, take as established that the ship is owned by American interests; or, if justice requires, the court should enter a default judgment on the issue of liability.

The Fifth Circuit in the present case noted the existence of *Lekkas* as contrary authority, but without explanation declined to follow it. 629 F.2d at 1139.

The Court of Appeals for the Eighth Circuit is also at odds with the Fifth Circuit's decision herein. In *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979), *cert. den.*, 444 U.S. 832 (1979), plaintiffs brought a diversity action in Nebraska against a Delaware corporation allegedly liable as guarantor of plaintiffs' rights under a commercial lease. After defendant failed to comply with discovery orders seeking jurisdictional information, the district court ordered sanctions under Fed.R. Civ.P. 37(b)(2)(A), deeming personal jurisdiction established and defendant responsible as guarantor on the lease obligations. Thereafter the court entered summary judgment against defendant on the issue of liability. Answering defendant's argument that the district court was without jurisdiction to invoke the sanc-

tions, the Court of Appeals termed the argument "meritless," explaining:

> Unlike subject matter jurisdiction, *in personam* jurisdiction may be obtained by actions of a party amounting to a waiver, and the court has jurisdiction to enter an order finding a waiver. [Citations] The same principles give jurisdiction to the District Court to enter a sanction order. It is established beyond cavil that a court has jurisdiction to determine jurisdiction, and a party cannot hope to avoid the jurisdiction of a court by concealing evidence regarding its activities in the forum state. 590 F.2d at 728 n. 5.

The Fifth Circuit opinion in the present case acknowledged *English* as contrary authority, but distinguished it on the basis of language in the *English* opinion (590 F.2d at 728 n. 6) indicating that the record there would have supported a finding of personal jurisdiction,[10] 629 F.2d at 1139. The purported distinction,

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10 The Court also suggested that the *English* Court had found *in personam* jurisdiction on the basis of "actions of a party amounting to a waiver," 629 F.2d at 1139, and implied it could find no waiver here. This treatment of *English* will not bear scrutiny, for if one defendant's inexcusable refusal to comply with jurisdiction discovery "waives" objections to personal jurisdiction so should another's. Traditionally, "waiver" cases are those in which defendant voluntarily appears and contests on the merits or otherwise participates in the proceedings prior to raising the jurisdiction objection. See, e.g., *Zets v. Scott*, 498 F.Supp. 884, 886 (W.D. N.Y. 1980); *Marquest Medical Products, Inc. v. EMDE Corp.*, 496 F.Supp. 1242, 1246 (D. Col. 1980), (When the *English* Court mentioned waiver it cited to such situations.) None of the defendants in *English*, *Lekkas*, or the present case made that kind of waiver. What the above-quoted language from *English* says is that the present situation is *like* or *analogous to* waiver cases, in that defendant wish-

however, overlooks the clear import of the *English* Court's "jurisdiction to determine jurisdiction" statement, quoted above. Further, it ignores the fact that the perceived deficiencies in the present jurisdictional record were, in the Fifth Circuit's own stated view, entirely the product of defendants' refusals to submit to discovery.

While the narrow issue before the Fifth Circuit was the validity of a default judgment entered as a sanction under Fed.R.Civ.P. 37(b), the Court's reasoning would apparently foreclose the availability of any of the Rule 37(b) sanctions. The Court's language so indicated, 629 F.2d 1139 at headnote #9, and the Court did not distinguish *English* on the basis that it had involved a "lesser" Rule 37(b) sanction, i.e., taking personal jurisdiction as established, as it might well have done had it considered its reasoning limited to the default sanction. Nor would that approach have answered the Fifth Circuit's "sovereignty" objections; if "the limitations of sovereignty under due process" (629 F.2d at 1139) de-

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ing to challenge the *in personam* jurisdiction of a federal court has a choice. He may elect not to participate at all in the proceedings and later attack the judgment or resist execution on jurisdictional grounds. Alternatively, he may come into the proceedings to contest jurisdiction by filing a Rule 12(b) motion to dismiss, as these defendants did. Many cases have held that a defendant who chooses the latter option has "submitted to an obligation to provide information pertinent to the court's [jurisdictional] decision." *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972). Incurring that obligation might be termed a "waiver" of objections to the court's authority, but that reasoning does not help to answer why some defendants who shirk the obligation are sanctionable and others are not.

mand the presence of personal jurisdiction contacts, it is hard to see how *deeming* those contacts present answers the situation. The decision below means there can be no effective discovery on personal jurisdiction issues. The result and reasoning puts the Fifth Circuit at odds with the Fourth and Eighth,[11] and certiorari should be granted to resolve that conflict.

II. Certiorari Should Be Granted To Determine The Applicability Of State-Law and Fourteenth Amendment Personal Jurisdiction Concepts In Federal Court Cases Arising Under Federal Law.

The Fifth Circuit in the present case held that the Rule 37(b) sanction could not be imposed because plaintiffs had not proved the personal jurisdiction and service of process requirements flowing from the Texas long-arm statute, Tex.Rev.Civ.Stat. art. 2031b, and the Fourteenth Amendment. The opinion does not explain why a federal admiralty court should be thus restricted by state law and limits on state sovereignty. Petitioners will show that the Court was mistaken in requiring Texas contacts in this admiralty case.

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11 Another Eighth Circuit decision that may be squarely in conflict with the Fifth Circuit's decision in the present case is *Haskins v. Lister*, 626 F.2d 42, 43 (8th Cir. 1980), which upheld default judgment as a sanction for repeated refusals to comply with discovery orders against defendants who had "continually evaded service by the United States Marshal." The opinion does not clarify whether it was service of process that was evaded, or service of discovery items.

Federal courts in ordinary diversity cases are restricted as to personal jurisdiction by the standards applicable to state courts; these standards come from the applicable state statutes and the Fourteenth Amendment, and are imposed on diversity courts as a consequence of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).[12] Even as to diversity cases, thus limiting federal courts has been a hotly debated matter.[13] All commentators agree that whether diversity courts should be so limited is a question of *Erie* policy, and that it is certainly not *constitutionally* required that it be so.[14]

In cases like the present one, in which federal court jurisdiction is invoked to enforce rights created by federal law, there is *universal* agreement that nationwide service of process and personal jurisdiction is constitutionally permissible. *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 416-18 (9th Cir. 1977); *Honeywell Inc. v.*

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12 Many cases make it clear that it is *Erie* that is the source of those requirements in diversity cases. See, e.g., *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 598, 603 (5th Cir. 1969); *Arrowsmith v. United Press International*, 320 F.2d 219, 222-31 (2d Cir. 1963); *Communications Equipment v. Municipality of Anchorage*, 498 F.Supp. 632, 633 (N.D. Ala. 1980); *Red River Transport v. Custom Airmotive, Inc.*, 497 F.Supp. 425, 426 (D. N.D. 1980).

13 See, e.g., Judge Clark's exhaustive dissent in *Arrowsmith*, 320 F.2d at 234-44; Kaplan, "Amendments of the Federal Rules of Civil Procedure, 1961-63(I)," 77 Harv.L.Rev. 601, 631-32 (1964); Seeburger, "The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee", 40 Ind.L.Rev. 380 (1977); 4 Wright & Miller, Federal Practice and Procedure §275, p. 302.

14 See *Arrowsmith, supra*, 320 F.2d at 226; *Braman v. Mary Hitchcock Mem. Hosp.*, 631 F.2d 6, 8 (2d Cir. 1980); *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 416 (5th Cir. 1979).

Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). The relevant constitutional standards come from the Fifth, not the Fourteenth Amendment. The relevant Fifth Amendment inquiry is whether defendant had actual notice of the proceedings (which the present defendants plainly had) and whether service was made within the United States. *Driver v. Helms*, 577 F.2d 147, 157 (1st Cir. 1978), rev. on other grounds, 100 S.Ct. 774 (1980); *Mariash v. Morrill, supra*, 496 F.2d at 1143. Some cases suggest an additional Fifth Amendment requirement of "minimum contacts" with the United States as a whole, at least in cases in which an alien defendant is served outside the boundaries of the United States.[15] See, e.g., *Wells Fargo, supra*, 556 F.2d at 416-18; *Mariash, supra*, 496 F.2d at 1143; *Leasco Data Processing Equip. Co. v. Maxwell*, 468 F.2d 1326, 1340 (2nd Cir. 1972).

That the decision below was wrong to apply state-sovereignty limits is further shown by two very recent decisions of this Court. In *Stafford v. Briggs*, 100 S.Ct. 774 (U.S. 1980), this Court reversed decisions of the Court of Appeals for the First[16] and District of Columbia[17]

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15 In *GAF Corp. v. Barclay Bros., Inc.*, 497 F.Supp. 539, 540 (D. N.J. 1980), a diversity court recently stated that *International Shoe*'s "minimum contacts" requirements do not apply when service is made within the boundaries of the forum state.

16 *Driver v. Helms*, 557 F.2d 147, 155-57 (1st Cir. 1978).

17 *Briggs v. Goodwin*, 569 F.2d 1, 9-10 (D.C. Cir. 1977).

Circuits holding federal officials amenable to nationwide personal jurisdiction, service of process, and venue standards in damages actions for civil rights violations under 28 U.S.C. 1391(e). This Court held that 1391(e) did not apply to damages actions against federal officials in their individual capacities, and therefore did not reach the Courts of Appeals' determinations that Fifth Amendment due process standards were not offended by the provision for nationwide personal jurisdiction and service of process. However, the Court's discussion strongly implies agreement with that reasoning, 100 S.Ct. at 784-85. Dissenting, Justices Stewart and Brennan found 1391(e) applicable to the damages suits and therefore did reach the relevant Fifth Amendment question, 100 S.Ct. at 789:

> "[D]ue process requires only certain minimum contacts between the defendant and the *sovereign that has created the court.* [Citations.] The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. *No due process problem exists.*" [Emphasis supplied.][18]

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18 The dissenting Justices went on to point out that the liberal venue-transfer provision of 28 U.S.C. 1404(a) answered any "fairness" argument.

In *Leroy v. Great Western United Corp.*, 99 S.Ct. 2710 (U.S. 1979), this Court reversed a decision of the Fifth Circuit Court of Appeals that had held Idaho defendants amenable to federal court venue and personal jurisdiction in Texas in a suit based on federal law.[19] This Court reversed on the view that venue was improper and expressly did not reach "the constitutional question arising out of the attempt to assert personal jurisdiction over appellants." 99 S.Ct. at 2715. Dissenting, Justices White, Brennan, and Marshall found venue proper in the Texas court under 15 U.S.C. §78aa, and therefore did reach the constitutional issue, stating, 99 S.Ct. at 2721:

> "[T]here [are] no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents [citation.]"

It is therefore very clear that, insofar as contitutional limits go, the correct inquiry in the present case was Fifth Amendment due process and contacts with the United States, rather than Fourteenth Amendment standards and contacts with Texas. Further, in *Stafford* and *Leroy*, four Justices of this Court stated that under applicable Fifth Amendment standards personal jurisdiction can be asserted over any United States resident

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19 *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978). The Fifth Circuit held the Idaho defendants subject to personal jurisdiction under the Texas long-arm statute and the Fourteenth Amendment, and therefore did not reach the issue of whether there should be a federal personal jurisdiction standard in such a case.

anywhere in the United States. The majority opinion in *Stafford* implies agreement with that view. While the present defendants are not U.S. residents, they were served with process in the United States; the record herein shows significant United States contacts (R. 128, 137, 159, 180), and would have shown more but for defendants' "flagrant" and "contumacious' discovery roadblock. Petitioners submit that *Stafford, Leroy* and the above-cited lower court decisions show that personal jurisdiction could constitutionally be asserted over these defendants. At a minimum, the decisions certainly show that nothing in the constitution required the evisceration of the district court's discovery powers.

This section of the Petition has sought to demonstrate that the Fifth Circuit's application of state-law jurisdictional concepts could not validly derive from either constitutional law or *Erie* analysis. By way of attenuated postscript, it should also be explained that the reasoning and result below could not sensibly have come from Fed.R.Civ.P. 4(e). It is true that most of the above decisions applying or discussing the application of nationwide personal jurisdiction standards involved situations in which Congress had (or had arguably) provided for nationwide service of process. It is also true that, when service of process is made via Fed.R. Civ.P. 4(e) and a state long-arm statute, there is an argument based on the language of 4(e) — "service . . . under the circumstances and in the manner prescribed by [state] statute" — that federal courts are confined by state-law personal jurisdiction concepts. *However:* (1)

The Fifth Circuit did *not* rest its decision on the language of Rule 4(e) but on "limitations of sovereignty under due process," 629 F.2d at 1139. (2) Whether Rule 4(e) should confine a federal-question or admiralty court to state-law personal jurisdiction limits has been a vigorously debated topic in the courts of the Fifth Circuit and among the commentators;[20] reaching a conclusion one way or the other on that question would have involved extended analysis and inquiry which the Court below plainly did not make. (3) Applying Rule 4(e) to defeat discovery sanctions would have been an unexplained preference for one federal rule, 4(e), over another, 37(b), and it would have left unexplained the Fifth Circuit's apparent view that the Rule 37(a) discovery orders were valid, 629 F.2d at 1137. (4) To turn this case on Rule 4(e) would have required taking account of the fact that plaintiffs first served defendant Inversiones under Rule 4(d)(3) through its agent Gulf Coast Shipping of Houston (R. 103).[21] (5) Deciding the case on the basis of the language of Rule 4(e) would have required an accounting of the fact that Rule 4(d)(7), which by its terms is broad enough to encompass extraterritorial service, is unlike Rule 4(e) in that it refers to service "in the manner" prescribed by state law but omits reference to

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20 See, Judge Godbold's dissent in *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1293 (5th Cir. 1978); *Navarro v. Sedco, Inc.*, 449 F.Supp. 1355, 1357-58 n. 1 (S.D. Tex. 1978), and citations therein.

21 The Court below acknowledged that "plaintiffs were never given an opportunity to find or present facts through discovery indicating valid service," 629 F.2d at 1139, but evidently felt itself bound by defendant's assertion that Gulf Coast was not its agent.

"under the circumstances" prescribed by state law. (6) Finding that state-law limits come in through Rule 4(e) to defeat the district court's powers granted by Rule 37(b) would have been in conflict, at least in principle, with this Court's decision in *Walker v. Armco Steel Corp.*, 100 S.Ct. 1978, 1985-86 (U.S. 1980); this was a diversity case in which this Court reiterated and reemphasized the principle that, in cases of direct conflict between state law and a Federal Rule of Civil Procedure, the Federal Rule prevails.

III. Certiorari Should Be Granted To Resolve A Conflict Between the Decision Below And This Court's Decisions On The Deterrence Function Of Discovery Sanctions.

The Court of Appeals in the present case held that default judgment is not available as a sanction against defendants challenging federal court *in personam* jurisdiction, and seems to have foreclosed the availability of any of the Fed.R.Civ.P. 37(b) sanctions in such situations. There seems no way to read the decision that does not give substantial comfort to those who would hope to challenge federal court jurisdiction and conceal their contacts with the United States or the forum state. This result is completely at odds with recent emphasis in the decisions of this Court, the lower federal courts, and the literature of the importance of the general deterrence function of Rule 37(b) sanctions. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), this Court approved dismissal of the plaintiff's action as a sanction against refusal to make discovery, stating:

> But here as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

This Court recently reinforced and reaffirmed that policy in *Roadway Express, Inc. v. Piper*, 100 S.Ct. 2455, 2462 (U.S. 1980). The same policy was strongly emphasized by Justices Powell, Stewart, and Rehnquist, dissenting from writ denial in *AFC Industries, Inc. v. E.E.O.C.*, 439 U.S. 1981, 99 S.Ct. 865, 868-69 (1979).

The Courts of Appeals have been vigorously pursuing the *National Hockey League* deterrence policy. See generally, Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions," 91 Harv.L.Rev. 1033 (1978); Epstein et al., "An Update on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Clubs, Inc.," 84 F.R.D. 145 (1980), and citations therein; 4A Moore's Federal Practice, ¶ 37.02[2.-5]. The thrust of the Fifth Circuit's decision is diametrically opposed to the current of all these decisions and to the directives of this Court in *National Hockey League* and *Roadway Express*. The present decision conflicts in significant principle with all the above cases, including other decisions of the Fifth Circuit, and certiorari should be granted to resolve that conflict.

IV. Certiorari Should Be Granted To Resolve A Conflict Between The Decision Below and This Court's Decisions on "Jurisdiction To Determine Jurisdiction" In Admiralty Cases.

The present case was brought under the district court's admiralty jurisdiction, 28 U.S.C. §1333 (R. 4). It has been said that "[t]he autonomy of admiralty from the common law is of constitutional magnitude."[22] For example, *in personam* jurisdiction can be acquired in admiralty through the device of maritime attachment, Fed.R.Civ.P. B, by attaching any tangible or intangible property of defendant wherever found, without reference to whether defendant has ever had any other contacts with the United States.[23] Further, even apart from maritime attachment, it has been frequently stated that personal jurisdiction in admiralty can be upheld on the basis of a single prior visit of defendant's ship to the place of the forum.[24] In such cases, while

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22 *Grand Bahama Pet. Co. v. Canadian Transp.*, 450 F.Supp. 447, 453 (W.D. Wash. 1978).

23 See, e.g., *Amoco Overseas v. Compagnie Nationale Algerienne*, 605 F.2d 648, 655 (2d Cir. 1979) (see discussion of admiralty's "special history and [unique] circumstances," and of the concept of "jurisdiction by necessity"); *Grand Bahama, supra*, 450 F.Supp. at 452-56; *Engineering Equip. Co. v. S.S. Selene*, 446 F.Supp. 706, 709-10 (S.D. N.Y. 1978). [These cases conclude that *Shaffer v. Heitner*, 433 U.S. 186 (1977), does not limit maritime attachment.]

24 *Kane v. Union of Soviet Socialist Republics*, 394 F.2d 131 (3d Cir. 1968); *Gkiafis v. Steamship Yiosonas*, 342 F.2d 546, 555 (4th Cir. 1965); *Engineering Equip. Co., supra*, 446 F.Supp. at 710 (alternative holding); *Granite & Quartzite Centre, Inc. v. M/S Virma*, 374 F.Supp. 1124 (S.D. Ga. 1974); *Mackensworth v. American Trading Transp. Co.*, 367

state law thought applicable via Fed.R. 4(e) might require that the lawsuit arise out of that ship contact, there is probably no *constitutional* requirement to that effect.[25]

The above special characteristics of admiralty jurisprudence strongly suggest that the court below should have found personal jurisdiction established over these admiralty defendants on the basis of the showing of defendants' and the UKOLA's contacts with the United States and with Texas that plaintiffs were able to make even in the fact of defendants' discovery roadblock. More to the present point, they show that the Fifth Circuit's opinion, which did not even mention the fact that this was an admiralty case, overlooked the relevance of this Court's decisions on the scope of admiralty's "jurisdiction to determine jurisdiction."

The scope of admiralty's concept of jurisdiction to determine jurisdiction was firmly established in *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 691 (1950). Plaintiffs in that case sought to proceed against foreign corporate defendants by way of the writ of foreign attachment (now called maritime attachment, Fed.R.Civ.P. B) through seizing a vessel in

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F.Supp. 373 (E.D. Pa. 1973) (opinion, including headnotes, in verse); *Mitsubishi Shoji Kaisha Ltd. v. M/S Galina*, 323 F.Supp. 79, 82 (S.D. Tex. 1971).

25 See *Mackensworth, supra; Long v. Vessel "Miss Ida Ann"*, 490 F.Supp. 210, 214-15 (S.D. Tex. 1980); *Navarro v. Sedco, Inc.*, 449 F.Supp. 1355, 1359-60, 1361-62 (S.D. Tex. 1978); *Edwards v. Gulf Mississippi Marine Corp.*, 449 F.Supp. 1363, 1368 (S.D. Tex. 1978).

the jurisdiction of the United States District Court where suit was brought. Defendants contested the validity of the attachment, contending that the vessel no longer belonged to the defendant. Plaintiffs alleged that the transfer was fraudulent and an effort to defeat the jurisdiction of the court. Both the trial court and the Court of Appeals for the Fifth Circuit concluded that admiralty lacked subject matter jurisdiction to inquire into whether the transfer was fraudulent. Cutting through that argument, this Court, in an opinion by Justice Frankfurter, held that the importance of the maritime attachment device as a means of providing jurisdiction in admiralty meant that the court must have power to protect its jurisdiction by examining the transfer, stating:

> It would be strange indeed thus to hobble a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce.

The Fifth Circuit's decision herein imposes a limit on the power of an admiralty court to inquire into and (if the facts warrant) perfect its jurisdiction over a peripatetic maritime defendant that is antithetical to *Swift*.

More recently, in *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 309-10 (1970), this Court treated the issue of subject matter jurisdiction under the Jones Act (in an action by an alien plaintiff against a foreign corporate

shipowner) in a way that conflicts in principle with the decision below. The *Rhoditis* suit originated as a libel *in rem* against the vessel. After discovery revealed substantial United States ties, plaintiff moved to have the Jones Act applied (see opinion of United States Court of Appeals for Fifth Circuit, 412 F.2d 919, 920 n. 4 (5th Cir. 1968).) This Court upheld application of the Jones Act on the basis of the discovery-assisted finding that the actual ownership of the vessel rested principally in a long-time resident alien of the United States. Pointing out that the resident alien enjoyed the same constitutional protections of due process as a citizen, this Court articulated as a *quid pro quo* his amenability to the obligations of a United States shipowner under the Jones Act and other United States law.

The Fifth Circuit decision in the present case cuts against *Rhoditis* by effectively depriving the plaintiffs of the assistance of the federal judiciary in discovering the actual United States contacts of the owners and operators of the UKOLA. The district court herein determined to pursue discovery on jurisdictional issues before deciding on the motions to dismiss partly on the basis of counsel's assurance that preliminary investigations had suggested fairly frequent contacts of the UKOLA with the United States and that the actual beneficial ownership of the vessel was in United States citizens or permanent resident aliens of the United States. If plaintiff is not to have the benefit of discov-

ery to validate or rebut those preliminary indications, then the principle of *Rhoditis* is undone.

Because the decision below conflicts in principle with *Swift & Co.* and *Rhoditis*, certiorari should be granted.

V. Certiorari Should Be Granted To Resolve Conflict Among The Federal Courts on the Meaning Of This Court's Decision In *United States v. United Mine Workers of America*.

The concept of "jurisdiction to determine jurisdiction" means that a federal court has the authority to determine whether it has jurisdiction over the parties to and subject matter of a suit. See generally 13 Wright & Miller, Federal Practice and Procedure §3536. Thus, a federal court can issue a temporary restraining order to preserve the status quo during a jurisdictional dispute and punish violation of that order as contempt, even though it may later develop that the court lacked subject matter or *in personam* jurisdiction. *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947); *United States v. Thompson*, 319 F.2d 665, 667 (2d Cir. 1963). The *United Mine Workers* decision stands for a substantial and broad "jurisdiction to determine jurisdiction" concept. See, e.g., *Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969), citing *United Mine Workers* and the "jurisdiction to determine jurisdiction" concept for the court's authority to proceed to the merits of a Selective Service Act dispute when the question of subject

matter jurisdiction and the merits issues were "inextricably intertwined".[26]

The teaching of all of these cases is that a federal court must necessarily be able to protect its jurisdictional inquiry through issuing orders *and sanctions* to effectuate determination of federal court jurisdiction. The Fifth Circuit's decision in the present case leaves the district court with the power to issue (unenforceable) orders but denies sanctions powers; it is in conflict with *United Mine Workers* and the above Court of Appeals decisions.[27]

Furthermore, petitioners submit that the present decision is exemplary of conflict within the Fifth Circuit Court itself as to the scope of the "jurisdiction to determine jurisdiction" principle. In *State of Florida v. Treasure Salvors*, 621 F.2d 1340, 1345-46 (5th Cir. 1980), the

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26 See also *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976), citing *United Mine Workers* and the principle of "jurisdiction to determine jurisdiction" in support of the *res judicata* effect of a prior decision rendered by a court lacking *in personam* jurisdiction; *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972), citing *United Mine Workers* and "jurisdiction to determine jurisdiction" for the court's authority to issue a temporary restraining order against all persons who might have notice of the order and punish violators for contempt in order to prevent disturbance of a school desegregation decree.

27 *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67 (1962), is closely related to the "jurisdiction to determine jurisdiction" cases and represents a policy of federal court jurisdiction and procedure that is offended by the decision below. *Goldlawr* stands for the proposition that a federal district court lacking personal jurisdiction has power to transfer the case to a district where personal jurisdiction can be perfected. 15 Wright & Miller, Federal Practice and Procedure §3827, p. 171.

majority used the "jurisdiction to determine jurisdiction" concept in a way that is fully opposed in principle to the present Fifth Circuit decision. Meeting the State's argument that the Eleventh Amendment meant the federal court lacked jurisdiction to adjudicate the ownership of state-claimed property, the Court stated:

> Once an appropriate challenge [to the State's claim of ownership] is made, the district judge is no longer compelled to conclude that the State owns the res in dispute. Instead, the Court must make a jurisdictional determination very similar to that made in the classic 'jurisdiction to determine jurisdiction' line of cases.

Judge Rubin, a member of the Fifth Circuit panel that decided the present case, dissented in *Treasure Salvors*, taking a much narrower view of the "jurisdiction to determine jurisdiction" concept, 621 F.2d at 1351:

> The doctrine that a court has jurisdiction to determine its own jurisdiction does not permit it to decide the merits of a suit against the state. Once the state appears and asserts title to the property in dispute the Court's jurisdiction is ended.

Judge Rubin's view of the "jurisdiction to determine jurisdiction" concept prevailed in the present case, 629 F.2d at 1139.

That view squarely conflicts with cases like the Seventh Circuit decision in *Nestor v. Hershey, supra*, and it conflicts in principle with the *United Mine Workers* case

and its progeny. Certiorari should be granted to resolve these conflicts.[28]

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

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29 Another Fifth Circuit decision showing a dispute within that Court as to the meaning of "jurisdiction to determine jurisdiction" is *United States v. Holland*, 552 F.2d 667, 675 (5th Cir. 1977), *vacated*, 565 F.2d 383 (5th Cir. 1978).

CERTIFICATE

I hereby certify, pursuant to United States Supreme Court Rule 28.3, that all counsel of record herein have been served with three copies each of this Petition by depositing same in the United States Mail, first class postage prepaid, properly addressed to counsel at his post office address.

APPENDIX "A"

Maria Emella FAMILIA DE BOOM, et al.,
Plaintiffs-Appellees,

versus

AROSA MERCANTIL, S.A. and
Inversiones Calmer, S.A.,
Defendants-Appellants.

No. 79-1964

United States Court of Appeals,
Fifth Circuit.

Nov. 7, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, HENDERSON and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

This is an appeal from a default judgment entered against the defendants, Arosa Mercantil, S.A. ("Arosa") and Inversiones Calmer, S.A. ("Inver-

siones"), for failure to comply with the district court's order compelling answers to interrogatories pursuant to Fed.R.Civ.P. 37. These interrogatories concerned matters relevant to the determination of the court's *in personam* jurisdiction over defendants. Upon failure to answer, the court refused to consider the defendants' Rule 12(b) motion to dismiss for lack of jurisdiction and entered a default judgment assessing damages against both defendants jointly, severally, and in solido of $1,129,341.93 as a sanction for failure to make discovery. Fed.R.Civ.P. 37(b)(2)(c).

The issues on appeal are: 1) whether the district court had personal jurisdiction over the defendants upon which to base the default judgment; and 2) whether the district court abused its discretion in granting a default judgment for over $1,129,000 as a sanction for failure to answer interrogatories. Since we feel that the plaintiff failed to adequately prove personal jurisdiction, we must reverse, and remand to the district court for further proceedings.

This case arises out of the sinking of the motor vessel UKOLA on the high seas of the Gulf of Mexico on January 19, 1977. The vessel, a freighter used for transporting bulk commodities, had sailed from the Dominican Republic on or about January 15, 1977. Approximately two days out of port, the vessel was directed to proceed to Galveston, Texas to offload her cargo of sugar. As a result of the sinking, twenty of twenty-

three crewmen aboard the UKOLA died and the vessel and her cargo of sugar were lost.

This suit was filed by one survivor and the personal representatives of a number of the deceased seaman against Arosa, the owner of the M/V UKOLA and Inversiones, the vessel's charterer.[1] The plaintiffs alleged damages under the Jones Act, 46 U.S.C. §688 (1976) and general maritime law. The merits of the claim have not been addressed.

After filing suit, plaintiffs filed six interrogatories directed to Arosa. There was no response of any kind by Arosa until a hearing on plaintiff's motion to compel answers to the interrogatories on July 18, 1977 when Arosa entered a motion to dismiss for lack of personal and subject matter jurisdiction,[2] and for insufficiency of service of process. At this hearing the court ordered Arosa to file answers to these first interrogatories. Arosa filed the answers on September 2, 1977.

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1 Favori Shipping Company was also joined as a defendant, but was not included in the default judgment order. The default judgment against Arosa and Inversiones was made a final judgment by order of the district court pursuant to Fed.R.Civ.P. 54(b), March 9, 1979.

2 Defendants argue that the default judgment cannot stand because the trial court lacked subject matter jurisdiction. What the defendants characterize as subject matter jurisdiction, the question of whether these plaintiffs are entitled to protection under the Jones Act, actually concerns the merits of the case. The trial court never determined the case on the merits and neither shall we.

Plaintiffs also filed a second set of interrogatories on July 11, 1977, which are of primary concern to us now. Arosa moved to postpone discovery and to extend the time to answer interrogatories. These motions, along with the previously filed motion to dismiss and plaintiffs' motion to compel answers to these interrogatories, were argued at a hearing before the court September 14, 1977. The court refused to consider the defendant's motion to dismiss until plaintiffs could gather facts concerning jurisdiction through discovery. The court also ordered Arosa to answer within 60 days the interrogatories which concerned jurisdictional and related issues.

After Arosa failed to answer within the time specified by the court order, plaintiffs moved for sanctions to be imposed; specifically, a judgment of default on the issue of liability against Arosa. Plaintiffs also filed a motion to compel answers to interrogatories served five months before on Inversiones, which had been joined as a defendant. At a hearing on March 8, 1978, the court granted the interlocutory default judgment against Arosa for failure to comply with the court's previous order, and set the hearing on the question of damages for May 9, 1978. As to Inversiones, the court refused to consider its motion to dismiss for lack of jurisdiction, as it had done with Arosa's similar motion, until plaintiffs had the opportunity to complete discovery. The court granted Inversiones an additional fifteen days to answer the interrogatories. Inversiones "answered" within the fifteen day period, but the

answers consisted primarily of statements that "defendant is unable at this time to answer."[3] None of the purported answers given by Inversiones were different from the answers given by Arosa, finally filed on March 23, 1978, after the default judgment was granted, so it is doubtful that Inversiones itself contributed directly to any of the answers.

At the May 9 hearing, the district court included Inversiones in the default judgment.[4] The plaintiff introduced depositions of the survivors of the various seamen as evidence on the issue of quantum of liability against the defendants. On December 26, 1978, the district court entered judgment assessing damages against Arosa and Inversiones jointly, severally, and in solido, in the sum of $1,129,341.93 plus interest at nine per cent from January 19, 1977.[5]

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3 The interrogatories consisted of such questions as: whether Inversiones was a corporation and, if so, its date and place of incorporation; whether Inversiones had a branch office in the United States; whether Inversiones carried on any type of business transaction in the United States; and other simple questions.

4 We emphasize that at the May 9 hearing the district court made it clear that it did not question the good faith of the attorney for Arosa and Inversiones. Rather, it found that the flagrant violation of the court's orders was attributable to the attorney's clients.

5 Eleven actions pending in five federal judicial districts, including this action, concerning the sinking of the M/V UKOLA were presented before the judicial panel on multidistrict litigation, pursuant to 28 U.S.C. §1407 (1976), to transfer all actions pending in districts other than the Southern District of Florida to that district for coordinated or consolidated pretrial proceedings with the

It is well settled that a court has the jurisdiction to determine its own jurisdiction, subject to appellate review. *Atlantic Las Olas, Inc. v. Joyner*, 466 F.2d 496, 498 (5th Cir.); 13 Wright & Miller, Federal Practice and Procedure §3536 (1975). The district judge has broad discretion to allow discovery on the jurisdictional issue in order to facilitate its determination. *Washington v. Norton Manufacturing, Inc.*, 588 F.2d 441 (5th Cir.), *cert. denied*, 442 U.S. 942, 99 S.Ct. 2886, 61 L.Ed.2d 313 (1979). When a party fails to answer interrogatories served upon it by the other party, the court, upon motion by the discovering party, may enter an order compelling answers. Fed.R.Civ.Pro. 37(a). If the party then fails to comply with that order, the rules further provide for sanctions by the court, one of which is an order of default judgment against the disobedient party. Fed.R. Civ.P. 37(b)(2)(c).

Assuming, without deciding, that the trial judge was within his discretion in imposing the default judgment against Arosa and Inversiones for failure to comply with the order compelling discovery, that judgment is valid only if the court had personal jurisdiction over the defendants. The defendants assert that the record does not support jurisdiction under the Texas long-arm

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actions pending there. The panel, however, refused to include this action in the consolidated proceeding as it "would not accomplish the goals of Section 1407". This case was severed from the other claims before the panel and remanded to the Southern District of Texas. *In re Sinking of the Motor Vessel UKOLA*, 462 F.Supp. 385 (Jud.Pan.Mult.Lit. 1978).

statute, Tex.Rev.Civ.Stat.Ann. art. 2031b (Vernon 1964),[6] nor does it support jurisdiction so as to comply with federal due process. They also argue that plaintiffs did not satisfy the requirements of Article 2031b for service of process.

The burden is on the plaintiff to establish jurisdiction when challenged by the defendant. *Product Promo-*

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6 The Texas long-arm statute, Tex.Rev.Civ.Stat. §2031b (Vernon 1964), provides in pertinent part:

Act of engaging in business in state as equivalent to appointment of Secretary of State as agent

Sec. 3. Any foreign corporation, association, joint stock company, partnership, or nonresidential natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

* * * * * *

Delivery of process to Secretary of State; forwarding copy

Sec. 5. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

tions v. Cousteau, 495 F.2d 483 (5th Cir. 1974). In this case, the plaintiffs were foreclosed from presenting jurisdictional evidence in the exclusive possession of the defendants because the defendants refused to disclose the information in response to discovery procedures. That the plaintiffs may have been unable to obtain information from the defendants, however, does not exempt them from this burden of proof. For us to uphold the district court's order of default we must find facts in the record to support the court's exercise of personal jurisdiction over Arosa and Inversiones.

To establish personal jurisdiction over a non-resident defendant, the plaintiff must prove that the long-arm statute of the state in which the court sits confers jurisdiction and that the exercise of jurisdiction under state law comports with federal notions of due process. *Cousteau,* 495 F.2d at 489. The Texas long-arm statute, under which the plaintiffs assert jurisdiction, has been interpreted by the Texas Supreme Court to reach "as far as federal constitutional requirements of due process will permit." *U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760, 762 (Tex. 1977). Therefore, we turn immediately to the federal law question of constitutional due process.

In *International Shoe v. Washington,* 236 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the Supreme Court declared that a state could assert personal jurisdiction over a non-resident corporation provided it had "certain minimum contacts with [the state] such that the

maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.*, 326 U.S. at 317, 66 S.Ct. at 159, 90 L.Ed. at 102. Therefore, we must here decide if the defendants' contacts with Texas were sufficient to permit Texas to assert jurisdiction, and, if so, if the jurisdiction was asserted in the manner required by Rule 4, Fed.R.Civ.P., which permits service in the manner permitted by Texas law.

Due to the posture in which this case comes before us, the facts relevant to the jurisdictional issue do not appear on the record. Therefore, we feel it is impossible for us to find personal jurisdiction in this case. Courts have been liberal in finding jurisdiction in cases involving nonresident corporate defendants, *see, e.g., Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630 (5th Cir. 1980); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980); *Cousteau*. But on this record, the only contacts which the defendants have with Texas are that the UKOLA had been to Texas at least once before while Arosa was the owner and Inversiones was the charterer, and that the UKOLA was bound for Texas when the tragedy occurred. The answers to the interrogatories which were filed indicate that neither corporation had stockholders in Texas, or for that matter, in the United States. The record contains no proof of any contract for delivery of sugar in Texas, an agent in Texas, or any other facts which would be sufficient to satisfy the due process standard.

Although we refuse to find personal jurisdiction on the record as it is now, we feel that the plaintiffs should be given an opportunity to introduce those facts relevant to jurisdiction. If the defendant actually does have minimum contacts with the State of Texas, the plaintiff may be able to show it even though the defendant refuses to comply with discovery.

The plaintiffs ask that we find jurisdiction in this case through waiver. The Eighth Circuit, in *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir.), *cert. denied*, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 41 (1979), was faced with a situation much like the one presented here. In that case, the district court found the defendant corporation within its jurisdiction as a sanction for failure to respond to discovery. The court of appeals affirmed, recognizing that *in personam* jurisdiction may be obtained by actions of a party amounting to waiver. *Id.* at 728 n.5. The Fourth Circuit has also approved the use of the sanction of default judgment when the defendants refused to provide the information necessary to make these jurisdictional determinations. *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971). There is no Fifth Circuit guidance on this precise point.

Although we are tempted to follow the Fourth and Eighth Circuits and hold that the defendants waived jurisdiction by their contumacious conduct, we must refrain from doing so. Unlike *21st Phoenix*, we have no finding by the district court that the defendants were doing business in Texas. We have only the facts on the

record, which do not satisfy the due process requirement of jurisdiction. Without the necessary facts on the record, we may not impose jurisdiction.

This leaves the district judge in a quandary in trying to enforce his discovery order, but that is a necessary result of the limitations of sovereignty under due process. Although the district court undoubtedly has jurisdiction to determine its own jurisdiction, it cannot, on its own, establish jurisdiction. The Federal Rules of Civil Procedure determine methods of service of process, venue and other procedural requirements for exercising jurisdiction in federal actions. They relate only to procedure, however, and not to principles of jurisdiction except insofar as service of process, made in accordance with the rules, itself is a way of demonstrating or completing the court's jurisdiction. Although Rule 37 allows for the imposition of a default judgment as a sanction for failure to comply with discovery, it may be used only against parties who are within the court's jurisdiction.

As with a challenge to jurisdiction, when service of process is challenged, the party on whose behalf service is made has the burden of establishing its validity. 5 Wright & Miller, *supra*, §1353 (1969). Although the plaintiffs were never given an opportunity to find or present facts through discovery indicating valid service, we must again agree with the defendants, as the plaintiffs did not satisfy this burden. There is no showing on the record of an agency relationship between

Arosa and Lamonte, Burns & Co., upon whom service was made through the Texas Secretary of State, nor is there a showing of any connection between Inversiones and the Miami address to which process was mailed. Moreover, when service is made upon the Secretary of State pursuant to Article 2031b, the Texas courts require the record to show that the Secretary of State actually forwarded the process to the defendant. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973). There is no such showing in this record.

Texas courts also require an allegation in the complaint reciting the facts authorizing long-arm service of process. *McKanna v. Edgar*, 388 S.W.2d 927 (Tex. 1965). This court, however, has held that allegations, in the complaint are not necessary when the claim is filed in federal court if the facts appear elsewhere in the record. *Eyerly Aircraft Co. v. Killian*, 414 F.2d 951 (5th Cir. 1969). Here such facts do not appear in the complaint or anywhere else in the record.

Although service of process and personal jurisdiction may be waived by a party, we cannot find waiver by the defendants here. There is no waiver so long as the defendants expressly limited their appearance to the determination of those very issues, which was done by Arosa and Inversiones in this case.

Accordingly, we must reverse the default judgment entered by the district court. We do feel, however, that

the plaintiffs are entitled to another opportunity to develop additional facts which would support jurisdiction and valid service of process.

REVERSED AND REMANDED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

December 17, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-1964 MARIA EMELLA FAMILIA de BOOM, ET AL. -vs- AROSA MERCANTIL, S.A., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/s/ LINDA JOHNSON
Deputy Clerk

cc: Mr. Terry P. Ayre
Mr. David W. Robertson
Mr. Paul H. Due

APPENDIX "C"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, Sec. 1 TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 37(a) Federal Rules of Civil Procedure

RULE 37. Failure to Make or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Rule 37(b) Federal Rules of Civil Procedure

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in

accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the

failure was substantially justified or that the other circumstances make an award of expenses unjust.

Rule 4(d)(7) and 4(e) Federal Rules of Civil Procedure

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of the subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found

within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Tex. Rev. Civ. Stat. 2031b, sub-sections 3 and 5

The Texas long-arm statute, Tex.Rev.Civ.Stat. §2031b (Vernon 1964), provides in pertinent part:

Act of engaging in business in state as equivalent to appointment of Secretary of State as agent

Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom

service of process, may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-re ident natural person is a party or is to be made a party.

* * * * * *

Delivery of process to Secretary of State; forwarding copy

Sec. 5. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

APPENDIX "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA EMILIA FAMILIA deBOOM,
spouse of decedent Hugo Boom Martinez,
Individually, et al

versus C.A. G-77-28

AROSA MERCANTIL S.A., FAROVI SHIPPING CO.,
and INVERSIONES CALMER, S.A.

Filed: March 15, 1978

ORDER OF DEFAULT AGAINST DEFENDANT, AROSA MERCANTIL S.A.

On this the 8th day of March, 1978, there came for hearing pursuant to regular assignment, the motion by plaintiff in the above numbered and entitled proceeding for judgment of default on the issue of liability against one of the defendants herein, Arosa Mercantil S.A., on the basis of said defendant's alleged willful failure and refusal to answer interrogatories propounded by plaintiffs to said defendant after this Court had ordered this defendant to answer certain interrogatories at a contradictory hearing previously held on

plaintiffs' motion to compel answers to interrogatories.

Present: Paul H. Due', attorney for plaintiffs;

W. Garney Griggs, prior attorney of record for defendant, Arosa Mercantil S.A., and

Terry P. Ayre, substituted attorney of record for defendant, Arosa Mercantil S.A.

After reviewing the pleadings and the arguments of counsel, for oral reasons assigned:

IT IS ORDERED that the motion by plaintiffs for judgment of default on the issue of liability against defendant, Arosa Mercantil S.A., be and it is hereby granted; and, accordingly, judgment of default on the issue of liability is granted against defendant, Arosa Mercantil S.A. and in favor of plaintiffs herein.

ORDER RENDERED on the 8th day of March, 1978 at Galveston, Texas.

ORDER SIGNED on this 15th day of March, 1978, at Galveston, Texas.

/s/ FINIS E. COWAN
UNITED STATES DISTRICT
JUDGE
SOUTHERN DISTRICT
OF TEXAS

Order Submitted By:

Paul H. Due'
DUE', DODSON & deGRAVELLES
Attorneys for Plaintiffs
442 Europe Street
Baton Rouge, Louisiana 70802
Telephone: (504) 383-8851

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, CLERK

/s/ GUADALUPE S. PINSIN
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA EMILIA FAMILIA de BOOM, ET AL

versus C.A. No. G-77-28

AROSA MERCANTIL, S.A., ET AL

BEFORE The Honorable FINIS E. COWAN, District Judge

Filed: May 1, 1979

TRANSCRIPT OF PROCEEDINGS
OF MAY 9, 1978

APPEARANCES

Mr. Paul H. Due' and Mr. Mike Palminter, 442 Europe Street, Baton Rouge, Louisiana, appearing for the plaintiffs.

Mr. Terry P. Ayre of the law firm of Messrs. Brown, Sims & Ayre, 2000 South Post Oak Road, Suite 1735, Houston, Texas, appearing for defendants Arosa Mercantil S.A., and Inversiones Calmer S.A.

Mr. William H. Seele, 1314 Texas Avenue, Houston, Texas, appearing for defendant Farovi Shipping Company.

[3] PROCEEDINGS

THE COURT: All right. Let the record reflect that in connection with G-77-28 we went on the record this morning and commenced a hearing in connection with the proof of damages in connection with a judgment for failure to make discovery and interlocutory default previously entered against — it's Arosa, isn't it?

MR. AYRE: Yes, sir.

THE COURT: Arosa Mercantil S.A., and counsel for defendant Arosa filed and argued a motion to set aside the default.

The Court refrains from setting aside the default and overrules the defendant Arosa's motion to set aside the default and thereupon the plaintiffs came on and stated that they wished to introduce in evidence certain deposition testimony.

So, Mr. Palminter, I'll ask you to go ahead, please, sir, and introduce such evidence as you wish to introduce in connection with your proof of damages.

MR. PALMINTER: Your Honor, for the convenience of the Court, at Mr. Ayre's suggestion, what we have done is to join all of the [4] depositions by family. In other words each deposition pertains to the individual deceased seaman. We can offer them in global.

THE COURT: Yes, go ahead and offer them in global if you would.

MR. PALMINTER: There are 10 depositions.

THE COURT: State what the names of the deponents are in each instance and which decedent or claim.

MR. PALMINTER: The decedent, Hugo Boom Martinez. The depositions of Carlos Eusebio Boom Familia, and the deposition of Maria Emilia Familia de Boom, widow of Hugo Boom Martinez.

Second, the deposition of Enamia Fortuna. She is a dependent with a dependent child of Jose Albert Velez. One deposition.

Next, the deceased seaman's name is Roberto Cruz. We have the deposition of Rosa Cruz, the decedent's mother, and the deposition of Juan Mercedes.

Next, the deceased seaman is Ramon Carasco.

We have the deposition of Olga Hernandez, who is a dependent with 10 dependent [5] children, and we have the deposition of Carmen Nolasco, a dependent mother.

Next, the deceased seaman Jose Laluz Martino Sabino, and we have the deposition of Ercilia Marce-

lino. She is a dependent with six dependent children of the deceased Jose Laluz Martino Sabino.

Next, the deceased seaman Geronimo Encarnacio Figuero.

We have the deposition of Pastora Guillandeau, and the name is misspelled on the deposition. She is a dependent with four dependent children of the deceased seaman.

Next, the deceased seaman Leon Leazard Chevalier. And this deposition, this set, we took the deposition of one major child and there was a stipulation that the remaining major children would testify similarly, and we have the deposition of that major child who is, by the way, Freddie Ramon Chevalier, and with that we have the wife, Orfelina Mercado, widow of Leazard.

Next is the deceased seaman Eduardo Tavarez. We have the deposition of the widow, Maria Pina, widow of Tavarez.

Next is the deposition pertaining [6] to the deceased Luis Felipe Astico. And this group of depositions we have four, and first is Ercilia Marte De Los Santos. Also, Eusebia Astoscio. Also, Maria Alejandrina, Leon Garcia. Also, the deposition of Ramonita Mendez.

The deceased seaman Ramon Santana, and we have the deposition of Victoria Santana, dependent mother

of the deceased seaman. And Fatima Augustina Monegro, widow of Santana.

Those are the depositions, your Honor, and to each deposition by stipulation there are attached documents supporting the ages, birth, extracts and also matrimonial extracts in the public records in the Dominican Republic all in accordance with Dominican Law.

THE COURT: Do the defendants have any evidence in connection with the damage issue at all?

MR. SEELE: These depositions are being offered solely concerning the decision to be entered against the defendant in default?

THE COURT: Correct.

MR. SEELE: And for no other purpose at this time?

THE COURT: Correct.

[7] MR. SEELE: All right. We would have no testimony to offer then.

THE COURT: All right.

The Court also will establish the following schedule for the filing of memoranda.

The plaintiffs will file within two days a memorandum summarizing with reference to each decedent and the one survivor, the age of the decedents, the best information available on the record concerning his earnings, the number of his dependents, the regularity of his work and any other pertinent matters concerning an award of damages, including the amount claimed on behalf of each decedent.

And the defendants will have until one week from today, which will be May 16, in order to file a response making such arguments as seem appropriate concerning the damages to be awarded with reference to each decedent and the one survivor.

Gentlemen, is there anything else we need to put on the record in connection with the matter today?

MR. DUE': Nothing further in connection with Arosa Mercantil. We, of course, [8] have also asked the Court for relief in the nature of a default judgment against defendant Arosa Mercantil S.A., and we would in that connection offer again — of course, we have a memorandum in support of that, all of which appears in the record, but to indicate again the need for it we respectfully address the Court's attention to the most pertinent interrogatory asking for who are the stockholders and equitable owners of this company, and the defendants answer, after low these many months of pendency of this suit, which I don't have in front of me,

but of course, the record speaks for itself, the answer was that they couldn't give us the information.

THE COURT: What is your response to that, this motion for default against your client, Mr. Ayre?

MR. AYRE: We have answered all the interrogatories with all the information that's available to us.

THE COURT: When you say "available to us," you mean available to counsel, don't you?

MR. AYRE: That's correct.

THE COURT: But you still have not given to the plaintiffs the names of the owners of the [9] vessel?

MR. AYRE: Yes, sir, we have. When I spoke with Mr. Palminter last week, evidently there is a man in Panama that they want to depose and I have no objection to taking his deposition and finding out whether or not the information given to me is correct or not correct. The only reason we couldn't go last — I think we were going to take it yesterday in Panama, but as I have been out for two weeks and I just couldn't simply go Sunday to take that deposition.

As far as I know the information we have supplied with respect to stock ownership is correct. I have no information to the contrary.

THE COURT: I am not clear, Mr. Due', exactly what it is you have not been furnished.

MR. AYRE: I think we have given you the stock —

MR. DUE': Let me look at the record and I'll show you my problem.

MR. AYRE: I have the answers here. There is the interrogatory right there. No. 2.

MR. DUE': Your Honor, I haven't found it in the suit record. If I can pass this file copy to the Court at this time with reference [10] to Interrogatory No. 2, it asks is it a corporation, if so, state the date, citizenship, et cetera, and the names of the stockholders. And the answer, "Defendant is unable at this time to answer this interrogatory. As soon as this information is available."

THE COURT: Let me read into the record the interrogatory and the answer. What date was this interrogatory served?

MR. DUE': It was filed on September 7, 1977.

THE COURT: All right. And the answer?

MR. DUE': I am trying to find it. I don't see it in this duplicate file.

THE COURT: Here, your file copy would indicate it.

MR. DUE': April 14, 1978.

THE COURT: Is that an accurate date as far as you know, Mr. Ayre?

MR. AYRE: As far as I know, your Honor, yes.

THE COURT: And the interrogatory, for the record, reads:

"QUESTION: Is Inversiones Calmer [11] a corporation, if so, state the date and place of incorporation, citizenship of the corporation, whether the corporation is the successor of any other business entity, and if so the full name of all such predecessors within five years prior to the date of acts sued on; the full name, residence, address and citizenship of all stockholders of Inversiones within five years prior to the date of the accident and sued on up through the date of the accident."

And the answer to this interrogatory, "As soon as this information is available we will immediately supplement this interrogatory."

Let me ask you, Mr. Ayre, I don't in any way challenge your good faith, and as an officer of the Court I have complete faith in your integrity. Why is it your client in this lawsuit, which has been on file now a long

time, hasn't been able to furnish at least some of this rather fundamental information?

MR. AYRE: They have been able to supply it and I virtually cannot respond to why the stockholders, the names or identities of the stockholders have been withheld.

THE COURT: All right. In view of [12] that then, Mr. Ayre, I don't want this to reflect any discredit on you because I don't feel it reflects any discredit on you, but I am going to grant the plaintiffs' motion for a default for failure to make discovery against Inversiones Calmer S.A. And we will ask you to submit, Mr. Due', an order to that effect within two days in accordance with your other papers that you are to submit within two days, and a judgment which I will enter will run against both Arosa Mercantil S.A. and Inversiones Calmer S.A.

Now, is there anything else? I'm going to take your motion under advisement, Mr. Seele.

MR. SEELE: If I might just speak to the motion.

THE COURT: Go right ahead. Would you give me your first name?

MR. SEELE: William.

THE COURT: William. All right. Go ahead, Mr. Seele. The Court also has under consideration today Mr. Seele's motion which is a motion to dismiss for want of jurisdiction.

MR. SEELE: Your Honor, the motion is based on three parts. It includes a Rule 12-B [13] motion for failure to state a cause of action against this defendant. That is primarily based on our knowledge and the information that's been provided to us, and we understand is accurate from our client that the vessel was not owned —

THE COURT: 12-B motion has to be predicated on the pleadings. 12-B motion to dismiss has to be predicated on the pleadings.

MR. SEELE: I understand, your Honor.

THE COURT: Well, you're not talking about the pleadings —

MR. SEELE: I just want to speak to that first and then go into the other portion to bring something up to the Court.

THE COURT: Right.

MR. SEELE: We do not own, operate or control the vessel UKOLA. That is one of our positions.

Secondly, we have moved to dismiss, to quash service of the process upon the Farovi Shipping Company, and this was made sometime in September of 1977 by serving Gulf Coast Shipping Corporation which was alleged to be their agent. Gulf Coast Shipping Corporation was a sub-agent for [14] the chartered vessel, or for the charterer of the vessel. They were not appointed as an agent for service of process. And there is a line of cases that hold that a port or agent cannot serve unless there's been specific authority granted.

Thirdly, our motion also is to dismiss because we submit that we are a Florida corporation, organized, existing under the laws of the State of Florida. We are not doing business in Texas, have not done business in Texas, and that we are not amenable to personal jurisdiction of this court in accordance — even if service was tried under 2031-B in thes revise statutes. We have supported that by an affidavit by Frank Rosa who is the president of Farovi Shipping Corporation which is in support of the motion.

That is the crux of our motion that we filed on November 1st of 1977 which, I believe, we brought to the Court's attention in March of '78 at the last hearing.

There were some interrogatories propounded to us, we have answered those interrogatories yesterday in the mail, and we now have received some opposition to

the motion on the basis of the interrogatories. This is the first notice [15] we had, and that was yesterday, that our interrogatories were, according to Mr. Due', not sufficient. I bring this up because I am sure he is going to reply in that vein.

THE COURT: Your interrogatories or your answers to interrogatories?

MR. SEELE: Our answers to interrogatories. We have answered them to the best of our ability, who is the president and the officers of Farovi Shipping Corporation. We contend that we are not amenable to the jurisdiction of this Court and this litigation is pending there. The litigation pending in Florida, we are amenable to the jurisdiction of Florida. We have been served, we have appeared in Florida. It would seem to us to have this case tried in Florida as to Farovi and not here in Texas where we have no contacts.

THE COURT: What's your response to that, Mr. Due'?

MR. DUE': We get back again, may it please the Court, to the real question of who is the equitable owner of the vessel UKOLA. We, of course, are in opposition to the motion to dismiss and would at this time offer the discovery depositions that were taken of the Farovi people [16] in Florida, being more particularly —

MR. PALMINTER: They may be outside, your Honor.

MR. DUE': I am sorry, your Honor. Significantly in the depositions and more particularly in the file of the situation where we have various interests appearing.

In the Coast Guard record — once the ship went down there is a Coast Guard notation which we, of course, attach to our memorandum, and it's a communication that the Coast Guard received from George Rosa, who is one of the officers of Farovi, with their telephone number, and "UKOLA was our ship" is the quote from it.

I say that for this reason, because, of course, if indeed Farovi is the owner behind the scenes of this situation then, of course, all of the activity that was done which occurred here in Texas, a substantial trade of business conducted in this jurisdiction, then, of course, those acts likewise become the acts of Farovi.

The real question is who the equitable owner of the vessel UKOLA is and was Farovi truly an agent as opposed to an equitable owner in it. That question has still not been [17] resolved through any dilatory aspect, from our standpoint.

Another interesting point brought out in the files itself of Farovi in Miami was a notation appearing there after the vessel went down notifying San Miguel of the

occurrence and then as a response, I forgot the exact language because it appears in attachments to the deposition which the Farovi lawyers in Miami are under a Court order to produce for us and we have not gotten them yet but, anyway, the point about San Miguel who is an American citizen who lives in Puerto Rico, and we have been trying to get his deposition in San Juan, Puerto Rico and he has been dodging us on the thing, he failed to show, supposed to be a health situation.

Now, the question was asked to Mr. Frank Rosa, Sr., the president, and to Junior "Do you know San Miguel?"

"No, I don't."

Then he is confronted with the impeachable information in his file and this is on this particular vessel after the accident occurred, and, of course, the four corners of the deposition will speak for themselves. The point being there [18] has not been the candor and the cooperation and the full disclosure on the part of Farovi for the Court or for any of us.

THE COURT: I'll overrule Farovi's motion at this time, and submit me an order on that. I'll give you leave to urge it against Mr. Seele when the facts are fully developed.

Is there anything else anyone wants to put on the record with reference to this matter today?

I take it by your silence that there is not, and so this hearing will end.

REPORTER'S CERTIFICATE

I, F. Neil Robinson, Official Court Reporter for the United States District Court for the Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct manuscript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth. I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ F. Neil Robinson
F. Neil Robinson
Official Court Reporter
1917 Bank of the Southwest Bldg.
Houston, Texas 77002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA FAMILIA DE BOOM, ETC, et al,
Plaintiffs,

versus C.A. No. C-77-28

AROSA MERCANTILE, S.A., et al,
Defendants.

MEMORANDUM OPINION AND FINDINGS OF FACT RELATING TO DAMAGES ASSESSED IN CONNECTION WITH DEFAULT ENTERED AGAINST AROSA AND INVERSIONES CALMER

In connection with the assessment of damages attributable to the deaths of the 9 seamen in question and the damage to 1 survivor, the Court has before it the deposition testimony relating to each of the individual decedents. The damage findings expressed herein are predicated upon this deposition testimony and the inferences which this Court draws from that testimony.

EVIDENCE PRESENTED AND GENERAL CONCLUSIONS

The Court here makes findings of fact based upon abbreviated deposition testimony of relatives and de-

pendents of the decedents, all seamen domiciled in the Dominican Republic. Assessments of this nature would be difficult, even if the witnesses were before the Court in person. The difficulty is multiplied by the fact that the decision must be based on deposition testimony. In addition, it seems that either the translation or the transcript of the depositions was far from ideal. In addition, the difficulty is compounded by the fact that defendants have offered no evidence and engaged in only superficial cross-examination of the witnesses.

Nevertheless, there are sufficient facts before the Court, in admissible form, to enable the Court to make the findings of fact expressed herein.

The Court believes it appropriate to state initially certain general conclusions.

The pecuniary value of these decedents' lives is apparently considerably less than the pecuniary value of lives of seamen residing in more developed societies. The lives of these seamen were, of course, infinitely valuable to themselves and to their beneficiaries; however, from a pecuniary standpoint, these decedents and the beneficiaries lived and live in a different world. This perception may best be illustrated by the facts relating to Mr. Hugo Boom. Hugo Boom was a stable, hard working, steadily employed, seaman, married, a good father to his children. He supported his family of seven on a salary of approximately $300 per month and made, at the maximum, pecuniary contributions to the sup-

port of his family of about $3,300 per year. Similarly, Roman Nolosco supported eleven dependents by contributions of $175 per month. This Court concludes that a dollar in the Dominican Republic is, in comparative terms, much more valuable than the same dollar in the Continental United States. In fact, it would appear that a dollar in the Dominican Republic is worth about three times as much, in practical terms, as a dollar in the Continental United States. For this reason, as well as for the other reasons stated herein, the awards of damages set forth in these findings of fact may seem excessively conservative in the light of cases like *Denis v. Central Gulf*, 323 F.S. 943 (Eastern District of Louisiana, 1971); *Law v. C. Drilling Corporation*, 510 F.2nd 424 (5th Cir. 1975); *Hamilton v. Canal Barge Lines*, 395 F.Supp. 978 (Eastern District of Louisiana, 1975); and *Higginbotham v. Mobil Oil Corporation*, 360 F.Supp. 1140 (Western District of Louisiana, 1973). This Court will attempt to apply here the same basic analysis contained in the cases cited; but this Court's findings are predicated upon the hypothesis that the Dominican Republic is a different economic world.

In the event the Court is mistaken in the basic conclusion stated in the previous paragraph, the Court will allow counsel to re-open the evidence to present testimony from economists or other experts to demonstrate the error in the conclusions stated.

Another general conclusion which should be stated: it is apparent from the reading of the depositions that

there are vast differences in the character and tendencies of the decedents. Hugo Boom, for example, was a stable, married family man. Several of the decedents were living with women to whom they were not married or the fathers of numerous children, who have never been legitimized. On the other hand, the deposition testimony indicates that many of these relationships were stable and that the decedents were, in many instances, devoted fathers to the children who were produced from these unions. The Court must, to the extent possible from the evidence presented, make rational distinctions between the decedents.

With reference to the question of pain and suffering, the record before the Court is far from crystal clear. On the other hand, it certainly appears to the Court more probable than not that each of the decedents, for at least some period of time before his death, was conscious, did suffer from some period of intense pain, suffering, and mental anguish. There would appear to be no reason for distinctions between the various decedents insofar as the assignment of the pecuniary value for pain and suffering is concerned. On the authority of *Law v. C. Drilling Corporation*, supra., it would appear that some figure in the range of $15,000 might be appropriate for the pain and suffering attributable to the death of each decedent; however, as stated before, the Dominican Republic is a different economic world, and the Court has therefore determined (perhaps arbitrarily), that the damages for pain and

suffering attributable to each decedent should not exceed $5,000 per decedent.

The Court finds the record before the Court less than totally adequate; and for that reason, as set forth in more detail below, the Court will allow the parties to re-open the evidence, if they elect to do so in order to clarify those aspects of the evidence which trouble the Court. The inadequacies fall into several categories. First, plaintiffs allege that the Court should assume that each of the decedents would have a work expectancy predicated on the assumption that the decedent would work to age 64. It is apparent from the depositions that the decedents lived under conditions which, in our society, would be deemed primitive, and were probably not consistently afforded the degree of medical care normal for persons regularly employed within the continental limits of the United States. Accordingly, it seems very doubtful that a Dominican seaman has the same life or work expectancy as would the normal American worker. In the absence of evidence to the contrary, however, the Court must assume a work expectancy based on the assumption that the Dominican seaman would work to approximately age 64.

There is another aspect in which the record before the Court is far from complete. This relates to the manner of applying the discount factor in determining the present cash value of the decedents' future earnings. In this connection, the Court judicially knows, in a

very general way, that if a person has a work or life expectancy of approximately 20 years, the present cash value of his earnings is approximately one-half of that figure which would be obtained by multiplying a decedent's annual earnings by the number of years left in his work expectancy. The Court has applied this rough rule of thumb in

Decedent Hugo Boom Martinez. —

Hugo Boom Martinez, age 46, was second cook aboard the vessel in question. He had been a seaman for approximately 24 years and earned approximately $333 per month, contributing approximately $300 to the support of his family.

Martinez, at the time of his death, had a stable marriage to Maria Emilia Familia de Boom, the first named plaintiff in this case, and the couple were the parents of five children ranging in age from Carlos, 24 to Miguel Boom Familia, age 7.

Mrs. Boom testified that her husband provided her $300 per month almost every month. The court has computed loss of support in the following manner: $300 per month for 18 years is $64,800. The approximate present cash value of $300 per month for 18 years is $32,400, which has been divided between the beneficiaries in the manner set forth in the specific findings.

The court makes the following findings of fact with reference to this decedent.

A. Maria Emilia Familia deBoom (widow of Hugo Boom Martinez):

1. Loss of society	$15,000.00
2. Loss of services	2,287.00
3. Loss of support (½ of total)	16,200.00
4. Conscious pain and suffering prior to death (1/6 of total)	833.00
TOTAL	$34,320.00

B. Miguel Antonio (son, six):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (12 years)	6,000.00
3. Loss of support (12/29 of half)	6,642.00
4. Conscious pain and suffering (1/6 of total)	833.00
TOTAL	$23,475.00

C. Carlos Miguel (son, nine):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (9 years)	4,500.00
3. Loss of support (9/29 of half)	5,022.00
4. Conscious pain and suffering (1/6 of total)	833.00
TOTAL	$20,355.00

D. Candida Rosa (daughter, fourteen):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (4 years)	2,000.00

3.	Loss of support (4/29 of total)	2,268.00
4.	Conscious pain and suffering (1/6 of total)	833.00
TOTAL		$15,101.00

E. Narcisco (son, fourteen):

1.	Loss of society	$10,000.00
2.	Loss of nurture and guidance (4 years)	2,000.00
3.	Loss of support (4/29 of total)	2,268.00
4.	Conscious pain and suffering (1/6 of total)	833.00
TOTAL		$15,101.00

F. Carlos

1.	Loss of society	$10,000.00
2.	Conscious pain and suffering (1/6 of total)	833.00
TOTAL		$10,833.00

Decedent Jose Alberto Velez. —

Jose Alberto Velez was, at the time of his death, 43 years old. The witness, who seeks to establish a claim based upon contributions from Jose Alberto Velez (hereinafter "this decedent"), was Inamina Fortuna.

Inamina Fortuna was not married to Jose Alberto Velez. Inamina Fortuna testified that she was the wife of the decedent, but admitted that no ceremonial wedding had occurred. In addition, the deposition does not establish the factual elements necessary to conclude that a common-law marriage existed.

The witness had living with her a 14 year old girl named Milady Fortuna. The decedent was not the father of Milady Fortuna, but, according to the witness, made monetary contributions to the witness and to Milady Fortuna. The record is confusing because Inamina Fortuna initially testified that Jose Velez was the father of Milady Fortuna and then testified that he was not.

The witness claimed that Jose Alberto Velez sent money, in the range of $150 per month, to her regularly. On the other hand, two letters placed in evidence do not transmit $150. One sends 60 pesos and the other sends $100. The witness also testified "last time he was overseas he sent me $100." (Depos. pg. 6)

The witness did not know how long the decedent had been a seaman, how much time out of the year the decedent spent in her home, whether the decedent had other relatives or other children, and apparently knew nothing of the details of the decedent's life.

In addition, from the testimony of the witness, the Court is able to conclude only that the decedent probably made casual and sporadic monetary contributions to the witness in sums that cannot be measured with any degree of accuracy. The testimony of this witness is not sufficient for this Court to conclude that in reasonable probability this witness and Milady Fortuna have a legitimate claim for benefits from this decedent's death. Unless additional evidence is offered

with reference to this decedent, therefore, it is the Court's intention to enter a take nothing judgment in connection with the claimed beneficiaries of this decedent.

The judgment to be prepared should provide that the purported beneficiaries of Jose Alberto Velez take nothing.

Decedent Luis Felipe Astacio. —

This decedent was a 44 year old seaman who had an apparently stable relationship with Maria Garcia for three years before his death. Decedent and Maria Garcia were the parents of Cecilia Astacio. Decedent, according to the deposition testimony, provided approximately $250 per month to a household in which he resided with Maria Garcia, Ercilia Santos and his daughter. It seems rational and consistent with the evidence to attribute $75 per month to the support of decedent's daughter Cecilia Astacio. Decedent also acted as an attentive father to daughter Cecilia and spent his time in this household.

Decedent' other daughter, Santa Bienvenida Mendez, is the child of decedent and Romanita Mendez. Decedent had not lived with Romanita Mendez since 1970. Decedent provided $75 per month support for this daughter, had a good relationship with the daughter but had not visited the daughter for five months before his death. It seems probable that decedent's prin-

cipal efforts as a father were directed toward the household in which he resided at the time of his death.

Decedent's mother is Eusebia Astacio, whom he visited monthly and to whom he occasionally made financial contributions of indeterminate amounts. .

The court's reasoning on loss of support attributable to this decedent is: Decedent was contributing approximately $75 per month to the support of each of his daughters, or $900 per year. The percent cash value of $900 per year for 17 years is approximately $7,500.

The present cash value of $900 per year for 5 years is approximately $4,000.

The evidence of financial regular contributions to decedent's mother is not sufficient to allow the court to quantify such contributions.

A.	Julia Cecilia (daughter of Luis Felipe Astacio; 1 year old at time of death):	
1.	Loss of society	$10,000.00
2.	Loss of nurture and guidance (17 years)	8,500.00
3.	Loss of support	7,500.00
4.	Conscious pain and suffering prior to death (½ of total)	1,666.00
TOTAL	.....	$27,666.00

B.	Santa Bienvenida (daughter of Luis Felipe Astacio; 13 years old at time of death):	
	1. Loss of society	$ 1,000.00
	2. Loss of nurture and guidance (5 years)	1,000.00
	3. Loss of support	4,000.00
	4. Conscious pain and suffering prior to death (1/3 of total)	1,666.00
TOTAL		$ 7,666.00
C.	Eusebia Astacio (mother):	
	1. Loss of society	$ 2,000.00
	2. Loss of support	
	3. Conscious pain and suffering prior to death (1/3 of total)	1,666.00
TOTAL		$ 3,666.00

Decedent Geronimo Encarnacion Figuereo. —

This decedent, 47, apparently had a stable relationship with the mother of his five children and contributed $300 per month regularly to his family. The court's reasoning on support is: The approximate present cash value of $3600 per annum for 17 years is approximately $32,000. One half of this ($16,000) would have gone to his children. With reference to this decedent, the court finds the following damages:

A. Anthony de Jesus (son, one year):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (18 years)	9,000.00
3. Loss of support (18/66 of one-half)	4,320.00
4. Conscious pain and suffering (¼ of total)	1,666.00
TOTAL	$24,986.00

B. Pablo Francisco (son, one year):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (17 years)	8,500.00
3. Loss of support (17/66 of total)	4,160.00
4. Conscious pain and suffering (¼ of total)	1,644.00
TOTAL	$24,304.00

C. Cayetano Miguel (son, two years):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (16 years)	8,000.00
3. Loss of support (16/66 of total)	3,840.00
4. Conscious pain and suffering (¼ of total)	1,644.00
TOTAL	$23,484.00

D. Virginia Cipriano (daughter, three):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (15 years)	7,500.00
3. Loss of support (15/66 of total)	3,680.00

4. Conscious pain and suffering (¼ of total)	1,644.00
TOTAL	$22,824.00

Decedent Ramon Carrasco Nolasco. —

The deposition testimony proves that this decedent, age 47, much like Roberto Cruz (see discussion *infra*), was a stable seaman, consistently employed who had lived with Olga Hernandez for 16 years and had supported and been an attentive father to their ten children as well as making financial contributions, the amount of which is not determinable, to the support of his mother. He provided $175 per month in support of his family. The court's computation of loss is based upon the following reasoning: At least one-third of the amount provided must have gone to the mother of these children. The balance may appropriately be divided as indicated below, based on the assumption that the present cash value of $175 per month for 16 years is approximately $22,000. The court finds the following facts with reference to the beneficiaries of this decedent:

A. Antonio Ramon (posthumous son):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (18 years)	9,000.00
3. Loss of support (18/109)	3,769.00

4. Conscious pain and suffering (1/11 of total) 454.00

TOTAL $23,223.00

B. Ramon Antonio (posthumous son):

1. Loss of society $10,000.00
2. Loss of nurture and guidance (18 years) 9,000.00
3. Loss of support (18/109) 3,769.00
4. Conscious pain and suffering (1/11 of total) 454.00

TOTAL $23,223.00

C. Saraya (daughter, one):

1. Loss of society $10,000.00
2. Loss of nurture and guidance (17 years) 7,000.00
3. Loss of support (14/109 of total) 2,882.00
4. Conscious pain and suffering prior to death (1/11 of total) 454.00

TOTAL $20,336.00

D. Roberto (son, five):

1. Loss of society $10,000.00
2. Loss of nurture and guidance (13 years) 6,500.00
3. Loss of support (13/109 of total) 2,661.00
4. Conscious pain and suffering prior to death 454.00

TOTAL $19,615.00

E. July (daughter, ten):

1. Loss of society $10,000.00
2. Loss of nurture and guidance (8 years) 4,000.00

3. Loss of support (8/109 of tota[1])	1,552.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$16,006.00

F. Froncia (daughter, ten):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (8 years)	4,000.00
3. Loss of support (8/109 of total)	1,552.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$16,006.00

G. Miguelina (daughter, 12):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (6 years)	3,000.00
3. Loss of support (6/109 of total)	1,330.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$14,784.00

H. Xionara (daughter, 14):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (4 years)	2,000.00
3. Loss of support (4/109 of total)	887.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$13,341.00

I.	Adalgesia (daughter, 15):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (3 years)	1,500.00
	3. Loss of support (3/109 of total)	665.00
	4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL		$12,619.00
J.	Carmen Nolasco (mother):	
	1. Loss of society	$ 1,666.00
	2. Loss of support	
	3. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL		$ 2,120.00

Decedent Jose Laluz Martino Salina. —

Salina, a 47 year old janitor aboard ship, had an apparently stable relationship with deponent Ercilla Marcelino and the couple had five living children at the time of decedent's death. Salina contributed $150 per month to the support of his family. The court's reasoning on loss of support is that the present cash value of $150 per month for 17 years is approximately $20,000. Approximately one-third of this amount ($6,666) is logically attributable to the mother and the balance may be divided between the five children. The damages found by the Court attributable to this decedent are:

A.	Jose (son, 9):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (9 years)	4,500.00
	3. Loss of support (9/27 of total)	7,920.00
	4. Conscious pain and suffering prior to death (1/6 of total)	833.00
TOTAL		$23,253.00
B.	Aljondrina (daughter, 10):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (8 years)	4,000.00
	3. Loss of support (8/27 of total)	7,200.00
	4. Conscious pain and suffering (1/6 of total)	833.00
TOTAL		$22,033.00
C.	Eduardo (son, 13):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (5 years)	2,500.00
	3. Loss of support (5/27 of total)	4,560.00
	4. Conscious pain and suffering (1/6 of total)	833.00
TOTAL		$17,893.00
D.	Porfiro (son, 15):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (3 years)	1,500.00
	3. Loss of support (3/27 of total)	2,640.00

4. Conscious pain and suffering (1/6 of total)	833.00
TOTAL	$14,973.00
E. Maria (daughter, 16):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (2 years)	1,000.00
3. Loss of support (2/27 of total)	1,680.00
4. Conscious pain and suffering (1/6 of total)	833.00
TOTAL	$13,513.00
F. Maria Salina (mother):	
1. Loss of society	$1,666.00
2. Loss of support	240.00
3. Conscious pain and suffering	833.00
TOTAL	$ 2,739.00

Decedent Roberto Cruz. —

The deposition testimony of Rosa Cruz and Juana Mercedes reveals that Roberto Cruz, 40, was a stable seaman consistently contributing $185 per month to Juana Mercedes, with whom he had lived for 18 years, and their six children. This decedent also made regular $15 per month payments to his mother, Rosa. Although not married, this decedent had a stable relationship, an apparently consistent work history and acted as a father to his six children. The court's reasoning with reference to loss of support is: The present

cash value of $185 per month for 24 years is approximately $27,000. Assuming that two-thirds of this was attributable to decedent's children is $17,820. In conformity with the general conclusions stated above the court makes the following findings with reference to this decedent:

A.	Josaline (daughter, eight):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (10 years)	5,000.00
	3. Loss of support (10/33 of total)	5,346.00
	4. Conscious pain and suffering prior to death (1/7 of total of $5,000)	714.00
TOTAL		$21,060.00
B.	Angel (son, nine):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (9 years)	4,500.00
	3. Loss of support (9/33 of total)	4,811.00
	4. Conscious pain and suffering prior to death (1/7 of total)	714.00
TOTAL		$20,025.00
C.	Ecly (son, eleven):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (7 years)	3,500.00
	3. Loss of support (7/33 of total)	3,742.00

4. Conscious pain and suffering prior to death (1/7 of total)	714.00
TOTAL	$17,956.00
D. Jose (son, fourteen)	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (4 years)	2,000.00
3. Loss of support (4/33 of total)	2,138.00
4. Conscious pain and suffering prior to death (1/7 of total)	714.00
TOTAL	$14,852.00
E. Elso (daughter, 16):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (2 years)	3,000.00
3. Loss of support (2/33 of total)	1,069.00
4. Conscious pain and suffering prior to death (1/7 of total)	714.00
TOTAL	$14,783.00
F. Aldia (daughter, 17):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (1 year)	500.00
3. Conscious pain and suffering (1/7 of total)	714.00
TOTAL	$11,214.00
G. Rosa Cruz (mother):	
1. Loss of society	$ 1,666.00
2. Loss of support	1,482.45

3. Conscious pain and suffering prior to death	714.00
TOTAL	$ 3,862.45

Decedent Ramon Santana Babi. —

Ramon Santana Babi was married (deposition of Agustina Monegro at page 4 and supporting document). He was thirty-two years of age at the time of his death and had been a seaman for several years. (Deposition of Victoria Santana at pages 4 and 7 and supporting affidavit). At the time of his death he was providing his wife with $150.00 per month (see deposition of Fatima Monegro at page 12). (One child was born posthumously). Ramon Santana also provided support to his mother in the amount of approximately $100.00 per month (see deposition of Victoria Santana at page 6). Loss of support attributable to this decedent is computed on the same basis as for the other married decedents who made regular contributions to the support of their families. The amounts which the survivors of Ramon Santana Babi are entitled to recover are as follows:

A. Fatima Monegro (widow of Ramon Santana Babi):	
1. Loss of society	$15,000.00
2. Loss of support (1/2 of total)	14,400.00
3. Conscious pain and suffering prior to death (1/3 of total)	1,666.66
TOTAL	$31,066.66

B. Ramona (posthumous daughter of Ramon Santana Babi):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (18 years)	27,000.00
3. Loss of support (1/2 of total)	14,400.00
4. Conscious pain and suffering prior to death (1/3 of total)	1,666.66
TOTAL	$53,066.66

C. Victoria Santana (dependent mother of Ramon Santana Babi):

1. Loss of society	$ 5,000.00
2. Loss of support	7,200.00
3. Conscious pain and suffering prior to death (1/3 of total)	1,666.66
TOTAL	$13,866.66

Decedent Leon Leazard Chevalier. —

This decedent was the 59 year old radio operator. He left a wife and six children, three of whom were adults, and a partially dependent mother. He contributed $350.00 per month to the support of his family. The court's reasoning as to loss of support is: The present cash value of $350.00 per month for five years is $21,000.00. The court finds the following damages attributable to this decedent:

A. Orfelina Mercado Leazard (widow)

1. Loss of society	$13,000.00
2. Loss of services	923.00

3. Loss of support (1/2 of total)	10,500.00
4. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$27,048.00
B. Miguelina Jocelin (daughter, 15)	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (three years)	1,500.00
3. Loss of support (1/2 of 1/2 of total)	4,636.63
4. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$16,761.63
C. Jocelin Miguelina (daughter, 15)	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (three years)	1,500.00
3. Loss of support (1/2 of 1/2 of total)	4,636.63
4. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$16,761.63
D. Freddys Ramon (adult son)	
1. Loss of society	$ 5,000.00
2. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$ 5,625.00
E. Mercedes Altagracia (adult daughter)	
1. Loss of society	$ 5,000.00

2. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$ 5,625.00
F. Juan Duff (adult son)	
1. Loss of society	$ 5,000.00
2. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$ 5,625.00
G. Socrates Manuel (adult son)	
1. Loss of society	$ 5,000.00
2. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$ 5,625.00
H. Altragracia Chevalier Leazard (mother, past age 64)	
1. Loss of society	$ 1,666.00
2. Loss of support	$ 1,200.00
3. Conscious pain and suffering prior to death (1/8 of total)	625.00
TOTAL	$ 3,491.00

Decedent Eduardo Tavarez Abreu. —

This decedent, age 25, was the First Officer of the UKOLA. An educated man, he was legally married, making a salary of $1,000 per month and from his education and age faced a bright future. Unlike the other decedents, one may logically and properly infer that this decedent's earning capacity would increase with

his maturity. The damages which the court finds are payable to his beneficiaries are:

A.	Rosa Maria Peina Tavarez (widow)	
	1. Loss of society	$15,000.00
	2. Loss of services	13,184.24
	3. Loss of support (1/2 of total)	117,000.00
	4. Conscious pain and suffering prior to death (1/2 of total)	2,500.00
TOTAL	.....	$147,684.24
B.	Eduardina (posthumous child)	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (18 years)	27,000.00
	3. Loss of support (1/2 of total)	117,000.00
	4. Conscious pain and suffering prior to death (1/2 of total)	5,000.00
TOTAL	.....	$159,000.00

Survivor Joaquin Salvador Facundo Melo. —

Joaquin Salvador Facundo Melo is one of three survivors of the disaster which befell the M/V UKOLA. He served aboard the vessel as Second Officer. As can be seen from Exhibit C, excerpts from Mr. Facundo Melo's deposition taken in Civil Action No. H-77-124 in the District Court for the Southern District of Texas, Houston Division, he underwent fear of death as well as considerable pain and suffering before he was retrieved from the waters of the Gulf of Mexico. This

plaintiff should recover $2,500.00 for physical pain and suffering as well as mental anguish and distress.

CONCLUSION

Either party who wishes to re-open the evidence for the purpose of introducing additional evidence should so move within five (5) working days after receipt of these findings. If no motion to re-open is made, counsel for plaintiff should, within fifteen (15) days, submit a form of judgment consistent with this order and this court's previous orders.

Signed at Houston, Texas, this the 17th day of November, 1978.

/s/ FINIS E. COWAN
UNITED STATES DISTRICT
JUDGE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, CLERK
/s/ Edith Rogers
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA FAMILIA DE BOOM ETC., et al,
Plaintiffs,

versus C.A. No. G-77-28

AROSA MERCANTIL, S.A., et al,
Defendants.

Filed: December 26, 1978

SUPPLEMENTAL MEMORANDUM OPINION AND FINDINGS OF FACT RELATING TO DAMAGES ASSESSED IN CONNECTION WITH DEFAULT ENTERED AGAINST DEFENDANTS, AROSA MERCANTIL, S.A. AND INVERSIONES CALMER, S.A.

It has been brought to the attention of the Court that there was inadverently omitted in the memorandum opinion and findings of fact relating to damages previously signed in the above numbered and entitled proceeding on November 17, 1978 and filed on November 20, 1978, an appropriate award of damages for Carlos, minor son of decedent, Ramon Carrasco Nolasco. Moreover, the itemization of awards of damages for the daughter, Soraya, of the same aforementioned decedent as set forth in the same memorandum opinion is erroneous in certain respects. Accordingly, the Court

herewith enters the following supplemental and revised findings respecting decedent Ramon Carrasco Nolasco and his surviving dependents in substitution of the findings pertaining to this decedent as contained on pages 10 through 13 of the previously signed and filed memorandum opinion:

Decedent Ramon Nolasco. —

The deposition testimony proves that this decedent, much like Roberto Cruz (see discussion infra), was a stable seaman, consistently employed who had lived with Olga Hernandez for 16 years and had supported and been an attentive father to their ten children as well as making financial contributions, the amount of which is not determinable, to the support of his mother. He provided $175 per month in support of his family. The court's computation of loss is based upon the following reasoning: At least one-third of the amount provided must have gone to the mother of these children. The balance may appropriately be divided as indicated below, based on the assumption that the present cash value of $175 per month for 16 years is approximately $22,000. The court finds the following facts with reference to the beneficiaries of this decedent:

A.	Antonio Ramon (posthumous son):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (18 years)	9.000.00
	3. Loss of support (18/109)	3,769.00
	4. Conscious pain and suffering (1/11 of total)	454.00
TOTAL		$22,223.00
B.	Ramon Antonio (posthumous son):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (18 years)	9,000.00
	3. Loss of support (18/109)	3,769.00
	4. Conscious pain and suffering (1/11 of total)	454.00
TOTAL		$23,223.00
C.	Soraya (daughter, one):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (17 years)	8,500.00
	3. Loss of support (17/109 of total)	3,431.00
	4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL		$22,385.00
D.	Carlos (son, four):	
	1. Loss of society	$10,000.00
	2. Loss of nurture and guidance (14 years)	7,000.00
	3. Loss of support (14/109 of total)	2,882.00

4. Conscious pain and suffering prior to death (1/11 of total)	454.000
TOTAL	$20,336.00
E. Roberto (son, five):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (13 years)	6,500.00
3. Loss of support (13/109 of total)	2,661.00
4. Conscious pain and suffering prior to death	454.00
TOTAL	$19,615.00
F. July (daughter, ten):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (8 years)	4,000.00
3. Loss of support (8/109)	1,552.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$16,006.00
G. Froncia (daughter, ten):	
1. Loss of society	$10,000.00
2. Loss of nurture and guidance (8 years)	4,000.00
3. Loss of support (8/109)	1,552.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$16,006.00

H. Miguelina (daughter, 12):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (6 years)	3,000.00
3. Loss of support (6/109 of total)	1,330.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$14,784.00

I. Xionara (daughter, 14):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (4 years)	2,000.00
3. Loss of support (4/109 of total)	887.00
4. Conscious pain and suffering prior to death	454.00
TOTAL	$13,341.00

J. Adalgesia (daughter, 15):

1. Loss of society	$10,000.00
2. Loss of nurture and guidance (3 years)	1,500.00
3. Loss of support (3/109 of total)	665.00
4. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$12,619.00

K. Carmen Nolasco (mother):

1. Loss of society	$ 1,666.00
2. Loss of support	
3. Conscious pain and suffering prior to death (1/11 of total)	454.00
TOTAL	$ 2,120.00

Furthermore, and in accordance with the discretion vested in this Court, pre-judgment interest at the rate of nine percent (9%) per annum from date of the loss herein (January 19, 1977), until paid will be awarded on all of the principal awards of damages. *Cf. Socony Mobil Oil Company, Inc. v. Texas Coastal and International, Inc.*, 559 F.2d 1008 (5 Cir. 1977); *National Air Lines, Inc. v. Stiles*, 268 F.2d 400 (5 Cir. 1959), certiorari denied, 361 U.S. 88, 80 S.Ct. 157.

Signed at Galveston, Texas, this 26th day of December, 1978.

/s/ FINIS E. COWAN
UNITED STATES DISTRICT
JUDGE

SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA FAMILIA DE BOOM, ETC., ET AL,

versus C.A. No. G-77-28

AROSA MERCANTIL, S.A., ET AL.

JUDGMENT

Plaintiffs' motion for default judgment on the issue of liability was granted by the Court, rendered on

March 8, 1978 and signed on March 15, 1978 by Honorable Finis E. Cowan, and, on March 8, 1978, the Court set for hearing on May 9, 1978, the determination of damages in the case. Plaintiffs' subsequent motion for similar default judgment on the issue of liability against defendant, Inversiones Calmer, S.A., was also set for hearing on May 9, 1978. On May 9, 1978, the plaintiffs' evidence argument on damages were considered along with plaintiff's motion for default judgment against defendant, Inversiones Calmer, S.A., and the motion by defendant, Arosa Mercantil, S.A., to set aside default judgment. The Court, for reasons assigned, granted the motion of plaintiffs for default judgment against defendant, Inversiones Calmer, S.A., denied the motion of defendant, Arosa Mercantil, S.A., to set aside default judgment on the issue of liability previously rendered against it, and took under advisement, with request for memoranda of authorities, the determination of damages to be awarded jointly and severally and in solido against defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A.

Having considered the evidence and the arguments of counsel, the law and the evidence being in favor thereof, in accordance with memorandum opinion and findings of fact relating to damages previously rendered and of record herein:

IT IS ORDERED AND ADJUDGED that the plaintiff, Maria Emilia Familia deBoom, widow of Hugo

Boom Martinez, recover from defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of One Hundred Eight Thousand Three Hundred Fifty Two Dollars ($108,-352.00), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Maria Emilia Familia deBoom, widow of Hugo Martinez, individually:	$34,320.00
B.	Maria Emilia Familia deBoom, as natural tutrix of the minor child of Hugo Boom Martinez, Miguel Antonio Boom Familia:	$23,475.00
C.	Maria Emilia Familia deBoom, as natural tutrix of the minor child of Hugo Boom Martinez, Carlos Miguel Boom Familia:	$20,355.00
D.	Maria Emilia Familia deBoom, as natural tutrix of the minor child of Hugo Boom Martinez, Candida Rosa Boom Familia:	$15,101.00
E.	Maria Emilia Familia deBoom, as natural tutrix of the minor child of Hugo Boom Martinez, Narcisco Boom Familia:	$15,101.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Carlos Eusebio Boom Familia, major son of Hugo Boom Martinez, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Ten

Thousand Eight Hundred Thirty-Three Dollars ($10,-833.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of the loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Enemena Fortuna, individually and as natural tutrix of the minor, Miledy Fortuna, alleged dependents of Jose Alberto Velez, take nothing and their claims against defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., be and they are hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff, Marie Alejandrina Leon Garcia, as natural tutrix of the minor child of Luis Felipe Astacio, Julia Cecilia Astacio, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Twenty-Seven Thousand Six Hundred Sixty-Six Dollars ($27,666.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Ramonita Mendez, as natural tutrix of the minor child of Luis Felipe Astacio, Santa Bienvenida Mendez, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and several-

ly and in solido, the sum of Seven Thousand Six Hundred Sixty-Six Dollars ($7,666.00) together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Eusebia Astacio, surviving dependent mother of decedent, Luis Felipe Astacio, individually recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Three Thousand Six Hundred Sixty-Six Dollars ($3,666.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of the loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Pastora Guillandeau, as natural tutrix of the minor children of Geronimo Encarnacion Figuereo, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Ninety-Five Thousand Five Hundred Ninety-Eight Dollars ($95,598.00), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Pastora Guillandeau, as natural tutrix of the minor child of Geronimo Encarnacion Figuereo, Adonay deJesus Encarnacion Guillandeau	$24,986.00
B.	Pastora Guillandeau, as natural tutrix of the minor child of Geronimo Encarnacion Figuereo, Pablo Francisco Encarnacion Guillandeau	$24,304.00
C.	Pastora Guillandeau, as natural tutrix of the minor child of Geronimo Encarnacion Figuereo, Cayetano Miguel Encarnacion Guillandeau	$23,484.00
D.	Pastora Guillandeau, as natural tutrix of the minor child of Geronimo Encarnacion Figuereo, Virginia Cipriana Guillandeau	$22,824.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Olga Hernandez, as natural tutrix of the minor children of Ramon Carrasco Nolasco, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of One Hundred Eighty-One Thousand Five Hundred Thirty-Eight Dollars ($181,538.00), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Antonio Ramon Carrasco Nolasco	$23,223.00

B.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Ramon Antonio Carrasco	$23,223.00
C.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Soraya Carrasco Nolasco	$22,385.00
D.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Carlos Carrasco Nolasco	$20,336.00
E.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Roberto Carrasco Nolasco	$19,615.00
F.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, July Carrasco Nolasco	$16,006.00
G.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Francia Carrasco Nolasco	$16,006.00
H.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Miguelina Carrasco Nolasco	$14,784.00
I.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Xionara Carrasco Nolasco	$13,341.00
J.	Olga Hernandez, as natural tutrix of the minor child of Ramon Carrasco Nolasco, Adalgesa Carrasco Nolasco	$12,619.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Carmen Nolasco, dependent mother of Ramon Carrasco Nolasco, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Two Thousand One Hundred Twenty Dollars ($2,120.00), together with legal interest thereon at the rate of nine

percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Ercelina Marcelino, as natural tutrix of the minor children of Jose Laluz Martino Sabino, recover of the defendants, Arosa Mercantil, S.A., and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Ninety-one Thousand Six Hundred Sixty-Five ($91,665.00), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Ercelina Marcelino, as natural tutrix of the minor child of Jose Laluz Martino Sabino, Jose Marcelino	$23,253.00
B.	Ercelina Marcelino, as natural tutrix of the minor child of Jose Laluz Martino Sabino, Alejandrina Marcelino	$22,033.00
C.	Ercelina Marcelino, as natural tutrix of the minor child of Jose Laluz Martino Sabino, Eduardo Marcelino	$17,893.00
D.	Ercelina Marcelino, as natural tutrix of the minor child of Jose Laluz Martino Sabino, Porfirio Marcelino	$14,973.00
E.	Ercelina Marcelino, as natural tutrix of the minor child of Jose Laluz Martino Sabino, Maria Marcelino	$13,513.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Maria Sabino, dependent mother of Jose Laluz Martino Sabino, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Two Thousand Seven Hundred Thirty Nine Dollars ($2,-739.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff Juana Mercedes, as natural tutrix of the minor children of Roberto Cruz, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Ninety-Nine Thousand Eight Hundred Ninety Dollars ($99,890.00), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Juana Mercedes, as natural tutrix of the minor child of Roberto Cruz, Josaline Cruz Mercedes	$21,060.00
B.	Juana Mercedes, as natural tutrix of the minor child of Roberto Cruz, Angel Cruz Mercedes	$20,025.00
C.	Juana Mercedes, as natural tutrix of the minor child of Roberto Cruz, Edy Cruz Mercedes	$17,956.00

D.	Juana Mercedes, as natural tutrix of the minor child of Roberto Cruz, Jose Cruz Mercedes	$14,852.00
E.	Juana Mercedes, as natural tutrix of the minor child of Roberto Cruz, Elsa Cruz Mercedes	$14,783.00
F.	Juana Mercedes, as natural tutrix of the minor child of Roberto Cruz, Aladia Cruz Mercedes	$11,214.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Rosa Cruz, dependent mother of Roberto Cruz, recover of the defendants, Arosa Mercantil, S.A. and Intersiones Calmer, S.A., jointly and severally and in solido, the sum of Three Thousand Eight Hundred Sixty-Two and 45/100 Dollars ($3,862.45) together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff Fatima Agustina Monegro Santana, widow of Ramon Santana Babi, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Eighty-Four Thousand One Hundred Thirty-Three and 32/100 Dollars ($84,133.32), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Fatima Agustina Monegro Santana, widow of Ramon Santana Babi, individually	$31,066.66
B.	Fatima Agustina Monegro Santana, as natural tutrix of the minor daughter of Ramon Santana Babi, Ramona Santana Monegro	$53,066.66

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Victoria Santana, dependent mother of Ramon Santana Babi, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Thirteen Thousand Eight Hundred Sixty-Six and 66/100 Dollars ($13,866.66), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Orfelina Mercado Leazard, widow of Leon Leazard Chevalier, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Sixty Thousand Five Hundred Seventy-One and 26/100 Dollars ($60,-571.26), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine (9%) percent per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A. Orfelina Mercado Leazard, widow of Leon Leazard Chevalier, individually $27,048.00

B. Orfelina Mercado Leazard, as natural tutrix of the minor child of Leon Leazard Chevalier, Miguelina Joselin Mercado $16,761.63

C. Orfelina Mercado Leazard, as natural tutrix of the minor child of Leon Leazard Chevalier, Joselin Miguelina Leazard Mercado $16,761.63

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Freddys Ramon Leazard Mercado, major child of Leon Leazard Chevalier, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Five Thousand Six Hundred Twenty-Five Dollars ($5,625.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Mercedes Altagracia Leazard Mercado, major child of Leon Leazard Chevalier, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Five Thousand Six Hundred Twenty-Five Dollars ($5,625.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and for all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff, Juan Duff Leazard Mercado, major child of Leon Leazard Chevalier, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Five Thousand Six Hundred Twenty-Five Dollars ($5,-625.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and for all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Socrates Manuel Leazard Mercado, major child of Leon Leazard Chevalier, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Five Thousand Six Hundred Twenty-Five Dollars ($5,625.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and for all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Altagracia Chevalier Leazard, dependent mother of Leon Leazard Chevalier, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Three Thousand Four Hundred Ninety-One Dollars ($3,491.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date

of loss (January 19, 1977) until paid and all costs of these proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Rosa Maria Pina Tavarez, widow of Eduardo Tavarez Abreu, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Three Hundred Six Thousand Six Hundred Eighty-Four and 24/100 Dollars ($306,684.24), said sum to be apportioned as provided hereinbelow, together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings:

A.	Rosa Maria Pina Tavarez, widow of Eduardo Tavarez Abreu, individually	$147,684.24
B.	Rosa Maria Pina Tavarez, as natural tutrix of the minor child of Eduardo Tavarez Abreu, Eduardina Tavarez Abreu	$159,000.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Joaquin Salvador Facundo Melo, recover of the defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., jointly and severally and in solido, the sum of Two Thousand Five Hundred Dollars ($2,500.00), together with legal interest thereon at the rate of nine percent (9%) per annum from date of loss (January 19, 1977) until paid and all costs of these proceedings.

JUDGMENT RENDERED AND SIGNED at Galveston, Texas, on this 26th day of December, 1978.

/s/ FINIS E. COWAN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARIA FAMILIA deBOOM, et al

versus C.A. No. G-77-28

AROSA MERCANTIL, S.A., et al

Filed: March 7, 1979

ORDER

Pursuant to the express request of MARIA EMILIA FAMILIA deBOOM, Individually, etc.; CARLOS EUSEBIO FAMILIA; ENEMENA FORTUNA, Individually, etc.; MARIA ALEJANDRINA LEON GARCIA, etc.; RAMONITA MENDEZ, etc.; EUSEBIA ASTACIO; PASTORA GUILLAUDEAU, etc.; OLGA HERNANDEZ, etc.; CARMEN NOLASCO; ERCELINA MARCELINO, etc.; MARIA SABINO; JUANA

MERCEDES, etc.; ROSA CRUZ; FATIMA AGUSTINA MONEGRO SANTANA, Individually, etc.; VICTORIA SANTANA; ORFELINA MERCADO LEAZARD, Individually, etc.; FREDDYS RAMON LEAZARD MERCADO; MERCEDES ALTAGRACIA LEAZARD MERCADO; JUAN DUFF LEAZARD MERCADO: SOCRETES MANUEL LEAZARD MERCADO; ALTAGRACIA CHEVALIER LEAZARD; ROSA MARIA PINA TAVAREZ, Individually, etc. and JOAQUIN SALVADOR FACUNDO MELO, plaintifs in the above numbered and entitled proceeding, and in order to make it clearly understood to all concerned that it was the intention of this Court that the judgment rendered and signed on behalf of the aforementioned plaintiffs in the above numbered and entitled proceeding and against defendants, AROSA MERCANTIL, S.A. and INVERSIONES CALMER, S.A. was and is a final judgment in accordance with Rule 54(b), Federal Rules of Civil Procedure, there being no just reason for delay in directing a final judgment in favor of the aforementioned plaintiffs and against defendants, AROSA MERCANTIL, S.A. and INVERSIONES CALMER, S.A., while the rights and liabilities of the aforementioned plaintiffs and the remaining defendant herein, Farovi Shipping Company, remain for adjudication:

IT IS ORDERED that pursuant to Rule 54(b), Federal Rules of Civil Procedure, the judgment of this Court rendered and signed herein on December 26,

1978, awarding the various plaintiffs the respective damages against defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A., is a final judgment in this action as to the aforementioned plaintiffs and defendants, Arosa Mercantil, S.A. and Inversiones Calmer, S.A.

ORDER RENDERED AND SIGNED on this 6th day of March, 1979.

/s/ FINIS E. COWAN
UNITED STATES DISTRICT
JUDGE

APPENDIX "E"

Summary Chronology of Discovery
Proceedings In Trial Court

Arosa

2-11-1977—Suit filed (R. 1).

2-16-1977—Service of process through Texas Secretary of State (R. 11).

5-12-1977—Before any filings by Arosa, plaintiffs filed first set of six interrogatories directed to Arosa through its Houston attorney (R. 13). (These interrogatories ask-

ed for identification of all UKOLA's owners at the time of sinking and for information respecting applicable insurance coverage.)

7-11-1977—Arosa had not responded to complaint or interrogatories. Plaintiffs moved the court to order Arosa to answer the interrogatories (R. 15).

—On the same date plaintiffs filed a second set of interrogatories directed to Arosa through its attorney (R. 21). (At least 52 of the 72 interrogatories were directed to jurisdictional issues.)

7-18-1977—Arosa filed Fed.R.Civ.P. 12(b) motion to dismiss, attacking subject matter jurisdiction, jurisdiction over the person, venue, and service of process (R. 37). (No supporting memorandum or affidavits accompanied this motion.)

8- 2-1977—Court ordered Arosa to answer first set of interrogatories (R. 39).

9- 2-1977—Arosa answered first set of interrogatories (R. 40).

9- 6-1977—Arosa filed memorandum (R. 44) and affidavit (R. 55) supporting its July 18 motion to dismiss.

—On the same date Arosa filed a motion to postpone discovery (R. 65) and a motion for additional time to answer plaintiffs' second set of interrogatories (R. 67).

9-14-1977—Plaintiffs moved the Court to order Arosa to answer the second set of interrogatories (R. 93).

—At a hearing on that date, the Court postponed decision on Arosa's motion to dismiss, pending discovery on the jurisdictional issues (1st Supp. Record, Vol. II, Tr. of Hearing of September 14, 1977, pp. 9-11), and ordered Arosa to answer specifically enumerated interrogatories deemed relevant to jurisdictional issues within 60 days (*id.* at pp. 12-26).

11-28-1977—The deadline for answering interrogatories having passed without response of any kind from Arosa, plaintiffs moved the Court for sanctions under Fed.R. Civ.P. 37(b)(2)(C) (R. 110).

12- 7-1977—Arosa moved for an additional 60 days to answer the interrogatories (R. 125). (For some reason this document was not stamped filed until March 14, 1978, but the certificate of service showing December 7 is correct.)

12-13-1977—Hearing scheduled on plaintiffs' motion for sanctions; postponed.

12-22-1977—Hearing scheduled on plaintiff's motion for sanctions; again postponed.

3- 8-1977—Arosa submitted a further memorandum in support of its July 18, 1977, motion to dismiss (R. 128).

—On the same date the court heard plaintiffs' November 28, 1977, motion for sanctions. Plaintiffs' counsel pointed out that 8 months had passed since the interrogatories were filed; 6 months, since the court ordered Arosa to answer; 4 months, since the motion for sanctions was filed; 3 months, since Arosa had requested an additional delay. (3d Supp. Record, Tr. of Hearing of March 8, 1978, pp. 10-11). Defendant offered no explanation or justification. The Court granted "interlocutory default" against Arosa, stating:

> If the interrogatories are, in fact, fully answered within 15 days, I will entertain the motion to set aside the interlocutory default. I will not promise to them a motion. * * * In all candor, I'm granting this default because apparently it's the only way to get Arosa's at-

tention and because I just can't believe they're so beleaguered that they can't furnish rather simple information that's called for by these interrogatories." (*Id.* at 12-13).

3-15-1978—Court signed order granting default against Arosa as orally ordered on March 8 (R. 151).

3-23-1978—Arosa filed answers to interrogatories that were incomplete and evasive (R. 153).

5- 8-1978—Arosa moved the court to set aside the interlocutory default.

5- 9-1978—At a hearing conducted on that date, the court overruled Arosa's motion to set aside the default. Counsel could offer no satisfactory explanation for the continued failure and refusal to answer interrogatories. The court indicated that it did not question the good faith of defense counsel; it found that the flagrant violation of the court's orders was attributable to the client. (1st Supp. Record, Vol. I, Tr. of Hearing of May 9, 1978, pp. 11-12. See also 5th Circuit opinion herein, 629 F.2d at 1137 n. 4).

This May 9 hearing was also a trial on the damages issues, extensive depositions having been taken in the preceding two months with defense counsel fully participating.

12-26-1978—Court rendered and signed judgment assessing damages against defendants* (R. 244).

1- 4-1979—Defendants filed motion to set aside judgment, reiterating jurisdictional objections (R. 262).

1- 8-1979—Court overruled that motion (R. 266).

3- 6-1979—Court issued order making judgment against defendants final under Fed.R.Civ.P. 54(b).

Inversiones

9- 7-1977—Action commenced against Inversiones by amended complaint (R. 70).

—Interrogatories in relevant respects identical to the second set directed to Arosa were filed with the amended complaint (R. 78).

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* By this time Inversiones had also been sanctioned under Fed.R.Civ.P. 37(b)(2)(C). See Inversiones Chronology, *infra*.

9-20-1977—Amended complaint served on Arosa through counsel (R. 105).

9-22-1977—Service of process on Inversiones through its agent, Gulf Coast Shipping Corporation of Houston (R. 103).

10-11-1977—Service of process on Inversiones through Texas Secretary of State (R. 107).

12- 7-1977—Inversiones filed Fed.R.Civ.P. 12(b) motion to dismiss, attacking subject matter jurisdiction, jurisdiction over the person, venue, and service of process (R. 143). No supporting memorandum or affidavits were filed.

—On the same date Inversiones moved for an additional 60 days to answer the interrogatories (R. 125).

—On the same date plaintiff moved to compel Inversiones to answer interrogatories (R. 116). (For some reason these documents were not stamped filed until March 14, 1978.)

3- 8-1978—Inversiones filed memorandum in support of its December 7, 1977, motion to dismiss (R. 128).

—At a hearing on that date, the Court postponed determination of Inversiones' motion to dismiss pending discovery on the jurisdictional issues (3d Supp. Record, Tr. of Hearing of March 8, 1978, p. 19), and ordered Inversiones to answer the specifically identified jurisdictional interrogatories within 15 days (*id.* at 17).

4-14-1978—Inversiones filed answers to interrogatories that were even more incomplete and evasive than Arosa's had been (R. 175).

4-17-1978—Plaintiffs moved for Fed.R.Civ.P. 37(b)(2)(C) sanctions against Inversiones (R. 190).

5- 9-1978—At a hearing conducted on that date, counsel for Inversiones could offer no satisfactory explanation of the continued failure to answer the interrogatories. The court considered the answers

submitted by Inversiones in some detail (1st Supp. Record, Vol. I, Tr. of Hearing of May 9, 1978, pp. 7-12), concluding that the complete unsatisfactoriness thereof warranted granting plaintiffs' motion for sanctions, and granted default judgment on the issue of liability against Inversiones (*id.* at 12).

The court indicated the violations of its orders were Inversiones' and not counsel's fault (*id.* at 11-12; see also 5th Circuit opinion herein, 629 F.2d at 1137 n. 4)

As indicated above, on this date the court also tried the damages issues, defendant's counsel having fully participated in the depositions and fully participating in the hearing.

The remaining steps affected Inversiones and Arosa identically. (See the *Arosa* chronology, above.)

APR 22 1981
AUSTIN, TEXAS.

NO. 80-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARIA EMILIA FAMILIA de BOOM, et al,
Petitioners,

versus

AROSA MERCANTIL, S.A., et al,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

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(713) 629-1580

Counsel of Record for Respondents

Of Counsel:

BROWN, SIMS & AYRE

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

I. Whether the decision in the court below is in conflict with decisions in other circuits authorizing discovery sanctions.

II. Whether the Fifth Circuit in the decision below applied the proper test for determining personal jurisdiction.

III. Whether the decision below conflicts with this Court's deterrence policy supporting sanctions for failure to participate in discovery.

IV. Whether the decision below conflicts with this Court's decisions in *Swift & Co. Packers v. Compania Columbiana del Caribe* and *Hellenic Lines v. Rhoditis.*

V. Whether the decision below conflicts with this Court's decision in *United States v. United Mine Workers of America.*

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NO. 80-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARIA EMILIA FAMILIA de BOOM, et al,
Petitioners,

versus

AROSA MERCANTIL, S.A., et al,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Arosa Mercantil, S.A., et al, the respondents herein, pray that the Petition for writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on November 7, 1980, be denied. That Court denied petitioners' petition for rehearing and rehearing en banc on December 17, 1980.

OPINIONS BELOW

The November 7, 1980, opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at 629 F.2d 1134, and is reprinted in the Petition (Appendix "A" pp. 1a-13a). The December 17, 1980, order of the Court of Appeals denying petitioners' petition for rehearing or rehearing en banc is not reported; it is reprinted in the Petition (Appendix "B", pp. 13a-14a). The prior decrees and orders of the United States District Court for the Southern District of Texas (of March 8, 1978; May 9, 1978; November 17, 1978; December 26, 1978; and March 6, 1979) are unreported. They are set forth in the Petition (Appendix "D" at pp. 23a-90a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1980. A petition for rehearing and rehearing en banc was denied on December 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced verbatim in the Petition (Appendix "C", pp. 14a-22a).

U. S. Const., Amend. V
Fed. R. Civ. P. 37(a)
Fed. R. Civ. P. 37(b)
Tex. Rev. Civ. Stat. § 2031b

The Respondents wish to include the Jones Act, 46 U.S.C. § 688, set out below:

> Recovery for injury to or death of seaman
>
> "Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.
>
> Mar. 4, 1915, c. 155 § 20, 38 Stat. 1185; June 5, 1920, c. 250 § 33, 41 Stat. 1007.

STATEMENT OF THE CASE

For convenience and ease of identification, the Plaintiffs in the District Court will be referred to herein as Petitioners. Defendant, Arosa Mercantil, S.A. in the District Court will be referred to herein as (Arosa), and Defendant, Inversiones Calmer, S.A. in the District Court will be referred to herein as (Inversiones).

Petitioners seek certiorari to review a decision and opinion of the United States Court of Appeals, Fifth Circuit, which reversed a default judgment on the issue

of liability rendered in petitioners favor by the United States District Court for the Southern District of Texas, Galveston Division. Subject matter jurisdiction in the District Court was based on the admiralty and maritime jurisdiction of the Court, 28 U.S.C. § 1333.

A. COURSE OF PROCEEDINGS AND DISPOSITION OF COURT BELOW.

On February 11, 1977, Petitioners filed their complaint against Arosa alleging damages under the Jones Act, 46 U.S.C. § 688, the general maritime law, and praying for lost wages under 46 U.S.C. § 596. [R. 1-10]. Service of process was attempted by serving Arosa's alleged agent, LaMorte Burns & Company, through the Secretary of State of the State of Texas. [R. 11].

On September 7, 1977, Plaintiffs amended their complaint adding, inter alia, Inversiones and Favrovi Shipping Company as Defendants. [R. 71-72]. Service was attempted on Inversiones by serving its alleged agent, Gulf Coast Shipping Corporation [R. 72, 77, 103]. Service was also attempted on Inversiones at its alleged corporate office in Miami, Florida, through the Secretary of State of the State of Texas. [R. 107]. Service of the amended complaint was made on Mr. W. Garney Griggs, Arosa's attorney. [R. 77, 105].

Both Arosa, [R. 37-38], and Inversiones, [R. 143-44], filed Motions to Dismiss the action under Rule 12 (b), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, and/or improper venue. The District Court did not rule on the Motion to Dismiss.

On March 14, 1978, the District Court granted Plaintiff's Motion for Default Judgment as to liability against Arosa for failure to comply with the discovery orders. [R. 151-52]. On May 9, 1978, the District Court granted Plaintiff's oral Motion for Default Judgment against Inversiones on the same grounds. [Transcript of proceedings, May 9, 1978, page 12].

On December 26, 1978, the District Court signed and entered Judgment assessing damages against Arosa and Inversiones, jointly, severally, and in solido, in the sum of $1,129,341.93 plus interest at 9% from January 19, 1977. This Judgment was not a Final Judgment because Favrovi Shipping Company remained as a party defendant in the action.

Thereafter, on March 6, 1979, the District Court ordered that the Judgment entered on December 26, 1978, was a Final Judgment against Arosa and Inversiones pursuant to Rule 54(b), Federal Rules of Civil Procedure. [R. 267-68]. Arosa and Inversiones filed their Notice of Appeal on March 20, 1979 [R. 272].

On November 7, 1980, the United States Court of Appeals, Fifth Circuit, reversed and remanded the Default Judgment awarded by the District Court against Arosa and Inversiones finding that the Plaintiff failed to adequately prove personal jurisdiction. Petitioners then petitioned the Court of Appeals for the Fifth Circuit for a rehearing or rehearing en banc, and the Court of Appeals denied that Petition on December 17, 1980.

B. STATEMENT OF FACTS

This case arises out of the sinking of the M/V *Ukola* in the Gulf of Mexico on January 19, 1977. The vessel

a freighter used for transporting bulk commodities had sailed from the Port of San Pedro a Marcoris, Dominican Republic, on or about January 15, 1977. Approximately two days out of port, the vessel was directed to proceed to Galveston, Texas, to off-load her cargo of sugar. As a result of the sinking, twenty of the twenty-three crewmen aboard the *Ukola* died and the vessel and its cargo of sugar was lost.

This suit was filed by the personal representatives of nine of the deceased seamen and by one survivor against Arosa, the owner of the M/V *Ukola* and Inversiones, the vessel's charterer. [R. 201].

All of the crewmen aboard the *Ukola* were Dominican citizens and were hired in the Dominican Republic. [R. 188]. Both Arosa and Inversiones are Panamian Corporations. All directors, officers and stockholders of Arosa and Inversiones are Panamian and reside in Panama.

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED IN THIS CASE BECAUSE THIS CASE DOES NOT CONFLICT WITH THE OTHER COURTS OF APPEALS ON WHETHER JURISDICTION TO DETERMINE JURISDICTION WILL SUPPORT DISCOVERY SANCTIONS AGAINST DEFENDANTS CHALLENGING FEDERAL COURT JURISDICTION.

The decision in the Court below does not create a conflict among the Circuits, and is clearly distinguishable from decisions in the Fourth and Eighth Circuits. The only issue before the Court of Appeals in the case below

by their own assessment is whether the District Court had personal jurisdiction over the defendants upon which to base the default judgment. The Court of Appeals found the District Judge had never made a finding of personal jurisdiction over the defendants, and further found from reviewing the record that there was no indication or no evidence to support personal jurisdiction over the defendants. As a result, the Court of Appeals reversed the decision of the District Court and remanded the case for further proceedings to determine jurisdiction. The Petitioners would have this Court believe that this very limited decision of the Court of Appeals for the Fifth Circuit is in conflict with the decisions of the Courts of Appeals for the Fourth and Eighth Circuits. In arguing this, Petitioners cite two cases *Lekkas v. Liberian M/V Caledonia,* 443 F.2d 10, (4th Cir. 1971) and *English v. 21st Phoenix Corporation,* 590 F.2d 723 (8th Cir. 1979), cert. den., 444 U.S. 832 (1979). Both of these cases are clearly distinguishable from the decision in the Court below.

In *Lekkas, supra,* the defendant, the vessel owner, requested the District Court to decline subject matter jurisdiction since the suit, based on a maritime personal injury, was brought by foreign seamen under the Jones Act against a foreign ship owner for injuries occurring in foreign waters. This was a decision which was within the Court's discretion based on the argument of forum non convienens. After the defendant ship owner declined to answer interrogatories about its business, the District Court granted the motion to decline. On appeal, the Fourth Circuit reversed the decision of the District Court finding that the District Judge had abused his discretion to grant the motion to decline without allowing or re-

quiring an inquiry into defendant's business, including the defendant's potential allegiance to the United States. The defendant had not challenged the Court's personal jurisdiction over him, so the Court clearly had the power based on its personal jurisdiction over the defendant to require further inquiry into the defendant's allegiance. The Fourth Circuit only advised in its decision reversing the District Court that the District Court might use sanctions under Rule 37(b) of the Federal Rules of Civil Procedure in order to require the defendant to answer interrogatories regarding its allegiance. The situation in *Lekkas, supra,* is significantly different from this case because in *Lekkas,* personal jurisdiction was clearly established, while in the case at bar there was absolutely nothing in the record upon which to base a finding of personal jurisdiction, and in fact, every indication in the record was contrary to jurisdiction, i.e., both Arosa and Inversiones are Panamian corporations and all the directors, stockholders, and officers are Panamian and reside in Panama [R. 178].

Petitioners then argue that the decision below is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *English v. 21st Phoenix Corporation,* 590 F.2d 732 (8th Cir. 1979), cert. den. 444 U.S. 832 (1979). Again, the decision of the Court below can be readily distinguished from this Eighth Circuit decision. In *English, supra,* plaintiffs brought a diversity action in Nebraska against a Delaware corporation. The defendant challenged the Court's personal jurisdiction over it, and failed to respond to discovery. As a result of defendant's further failure to respond to discovery on a jurisdiction issue, and failing to comply with orders compelling response to that discovery, the District Court ordered Sanc-

tions under Federal Rule of Civil Procedure 37(b) deeming personal jurisdiction established over the defendant. The Eighth Circuit Court of Appeals upheld the District Court's ruling because it expressly found from the record that facts in the record would have supported a finding of personal jurisdiction. *English, supra,* at 728 n. 6. The Court of Appeals for the Fifth Circuit in the decision below expressly relied on this language in the *English* opinion to find that the *English* case was clearly distinguishable from the case before the Court below. The Court below found that the record, as it stands, does not support a finding of personal jurisdiction, but rather supports the opposite finding. The Court below only decided the very narrow issue that the District Court could not enter default judgment on the merits without a finding of personal jurisdiction over the defendants and without any evidence in the record to support the finding of personal jurisdiction.

The Petitioners would give a very broad reading to the opinion of the Court below, arguing that the Fifth Circuit decision holds for the proposition that the District Court is powerless to enforce discovery sanctions on a defendant challenging personal jurisdiction. This is not the decision of the Court below. Rather, the decision of the Court below only decided that in this particular case, that the District Judge had erred in granting a default judgment on the merits against the defendants for failing to comply with discovery, without finding personal jurisdiction over the defendants and without any support in the record for such a finding.

Petitioners offer a third case as being in conflict with the decision from the Court below. *Haskins v. Lister,* 626

F.2d 42 (8th Cir. 1980). This case is clearly distinguishable from the decision below because the Court in *Haskins* imposed the sanction of default judgment because of the refusal by the defendants who had not challenged personal jurisdiction to comply with discovery on the merits of the case. Again, the Court was not faced with the challenge of personal jurisdiction, it had been clearly established before the default judgment was entered.

The case now before this Court is not repugnant with decisions in the Fourth and Eighth Circuits, and as a result there is no need for certiorari to resolve a conflict among the circuits.

II.

THE FIFTH CIRCUIT APPLIED THE PROPER TEST FOR DETERMINING IN PERSONAM JURISDICTION.

The Fifth Circuit Court of Appeals found that the Petitioners failed to prove that the defendants had the requisite minimum contacts with the State of Texas to support a finding of jurisdiction over those defendants by the United States District Court for the Southern District of Texas. This minimum contact test was the test set out by the Supreme Court in *International Shoe v. Washington,* 236 U.S. 310 (1945). It is clear that the due process requirement of the Fifth Amendment to the Constitution of the United States requires the employment of the *International Shoe* minimum contacts test and the requisite State Long Arm Statute to determine if due process would allow the particular Federal District Court to have

personal jurisdiction over a defendant. *Honeywell, Inc. v. Metz Apparatewerke,* 509 F.2d 1137 (7th Cir. 1975); *Wells Fargo Company v. Wells Fargo Express Company,* 556 F.2d 406 (9th Cir. 1977). The Court in Honeywell set out appropriate standards for the determination of personal jurisdiction in a case which involved the Federal Patent laws, *Honeywell, supra* at 1144:

> The test, then, is a flexible one which emphasizes the reasonableness of subjecting a defendant to suit; and the proper inquiry is whether the non-resident defendant can be said to have invoked, by act or conduct, the benefits and protection of the laws of the forum. [Citations omitted.]

The Ninth Circuit Court of Appeals pointed out that the minimum contacts requirements of due process are not all that must be met before an assertion of in personam jurisdiction would be proper, stating in their decision in *Wells Fargo, supra* at 416:

> . . . not only must the requirements of due process be met before a court can properly assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature.

In the *Wells Fargo* case, the plaintiffs sought to aggregate all the claims against a corporation in a Federal District Court in Nevada even though those claims did not all arise in Nevada. The Court held that the plaintiffs could not do this absent some authority in the Nevada Long Arm Statute which would allow the plaintiffs to do so. Petitioners now before this Honorable Court argue that the defendants alleged de minimus con-

tacts with the United States should be sufficient to allow the defendants to be hailed into Court in the Southern District of Texas. There is simply no probative authority for this proposition.

Petitioners seek to support their argument by citing a number of cases in which Congress specifically provided by statute for nationwide service of process. All of these cases are distinguishable, and it is clearly established that in the absence of such statutory authority for nationwide service of process and nationwide in personam jurisdiction, the relevant test is that set out in *International Shoe v. Washington, supra,* together with an examination of the Texas Long Arm Statute to determine whether or not the particular forum would have in personam jurisdiction over a defendant. *Honeywell, supra; Wells Fargo, supra.*

Petitioners rely on the case of *Driver v. Helms,* 577 F.2d 147 (1st Cir. 1978), reversed on other grounds, sub nom., *Stafford v. Briggs,* 100 S.Ct. 774 (U.S. 1980), to support their argument that the defendants' contacts with the United States are all that are necessary to be established for there to be personal jurisdiction in any of the Federal District Courts of the United States. This is simply not the case as pointed out by this Court in its opinion in *Stafford v. Briggs,* 63 L.Ed.2d at 13:

> "Absent the clear indication that Congress intended such a sweeping effect [personal jurisdiction in all of the Federal District Courts over an individual defendant not having contacts with all of those individual forums], we will not infer such a purpose nor will we interpret a statute to effect that result."

In *Stafford v. Briggs, supra,* and *Driver v. Helms, supra,* this Court and the First Circuit Court of Appeals were faced with the interpretation of a particular Federal statute applying to service of process and jurisdiction over Federal Government officials being sued by private U.S. citizen plaintiffs. 28 U.S.C.A. § 1391(e). It is clear that this particular statute expressly provides for nationwide service of process which this Court found within Congress' power, but this Court also found that that statute withstood constitutional muster on due process grounds. Another case Petitioners rely on to support their argument that contact with the U.S. is sufficient is *Mariash v. Morrill,* 496 F.2d 1138 (2nd Cir. 1974). The *Mariash* case was brought under the Securities Exchange Act of 1934 which has a specific provision for nationwide service of process. 15 U.S.C.A. § 78aa. The Court found that Congress has the power to determine the jurisdiction of the Federal District Courts, to set the boundaries of their jurisdiction, and further that this particular statute was constitutional if it comported with Fifth Amendment due process requirements. The *Mariash* case is clearly distinguishable from the case now before this Court because in this case, there is no statute which provides for such nationwide service of process, in this area of admiralty and maritime law. Congress has not acted to define every Federal District Court's bounds of jurisdiction as being the entire United States.

This case was brought under the Jones Act and the general maritime law. There is no statute governing personal jurisdiction or service of process under the general maritime law so the appropriate inquiry would be that used by the Fifth Circuit in looking to the Texas Long

Arm Statute to determine if a particular Federal District Court has personal jurisdiction over a particular defendant. *Stafford v. Briggs, supra.* The Jones Act, however, specifically provides which forum is the appropriate one and which forum has personal jurisdiction over a defendant. The Act, 46 U.S.C.A. § 688 states as follows:

> "Jurisdiction in such actions shall be under the Court of the District in which the defendant employer resides or in which his principal office is located."

The record in this case shows that the defendants are Panamanian corporations, all of their directors, officers and stockholders reside in Panama, and the plaintiffs were unable to find any office of either defendant within the Southern District of Texas. Clearly, whether reference is had to the Jones Act or to the general maritime law and the Texas Long Arm Statute, there is no indication in the record, in fact, the record is completely contra to the finding of personal jurisdiction in the United States District Court for the Southern District of Texas. Petitioners do not challenge the method employed by the Fifth Circuit Court of Appeals in the decision below in interpreting the Texas Long Arm Statute, they only challenge the Court's reliance on the interpretation of the Texas Long Arm Statute. The cases support the appropriateness of looking to the Texas Long Arm Statute to determine if the U.S. District Court for the Southern District of Texas would have personal jurisdiction over the defendants in the case now before the Court. This is the test employed by the Court below, and therefore, certiorari should be denied to determine whether or not the Fifth Circuit's inquiry was appropriate. It plainly was appropriate and correct.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION IN THE COURT BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON THE DETERENCE FUNCTION OF DISCOVERY SANCTIONS.

The Court of Appeals in the decision below found only that the District Judge could not enter a default against the defendants on the merits because there had been no finding of personal jurisdiction over the defendants. This decision does not create any conflict with decisions of this Court on the deterence function of discovery sanctions.

Petitioners rely heavily on three cases to support this conflict argument. The first is *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976). In this case, the District Court dismissed the plaintiff's case for failure to comply with discovery orders. This Court found, however, that the sanction and dismissal was appropriate because of the plaintiff's flagrant bad faith. There was never an issue of jurisdiction because the sanction was applied against the plaintiff, who had availed itself of the Court's jurisdiction with the filing of its suit. Then, having called upon the Court to redress wrongs allegedly committed by the defendants, plaintiff failed to comply with discovery reaching the merits of plaintiff's claims. It is clearly distinguishable from a case like the one before the Court in which the District Court never established personal jurisdiction over the defendants. Rather, the defendants in the case now before the Court did not avail themselves of the Court's jurisdiction but rather challenged the propriety of that jurisdiction

as well as challenging venue, sufficiency of process and sufficiency of service of process.

The next case relied on by petitioners to support their "conflict" argument is *Roadway Express, Inc. v. Piper,* 100 S.Ct. 2455 (1980). In this c. e the District Court imposed sanctions on plaintiff's counsel, taxing them with the winning parties' counsel fees, as a penalty for plaintiff's deliberate delay of the Court proceedings and their vexatious conduct. In *Roadway Express,* plaintiffs failed to comply with discovery requests and orders. Again, it was the wrongful activity of the plaintiff who had first availed itself of the Court's jurisdiction and who chose to ignore direct orders of the Court. Personal jurisdiction over the plaintiff was certainly never an issue. The Petitioners also rely on *ACF Industries, Inc. Carter Carburetors Division v. Equal Employment Opportunity Commission,* 439 U.S. 1081. This is yet another case in which this Court upheld the imposition of discovery sanctions on the plaintiff for failing to comply with discovery orders. Discovery went to the heart of the merits of plaintiff's claim.

In all of these cases which Petitioners allege conflict with the decision below, sanctions were imposed against the plaintiffs for failing to comply with discovery which went directly to the merits of the plaintiffs' claims. The case now before the Court is a far cry from that situation. Personal jurisdiction is not supported by evidence in the record over these defendants and the District Court never found personal jurisdiction. The defendants did not avail themselves of the District Court's jurisdiction, nor did they have sufficient contacts with the State of Texas to support jurisdiction. Discovery did not go to the merits

of the case, but only dealt with the issue of personal jurisdiction. The Fifth Circuit panel, in its decision held only that there was no personal jurisdiction on which to base the District Court's default judgment. In fact, the Petitioners could not cite any case in which the discovery sanction of default judgment on the merits imposed on a defendant challenging jurisdiction without any evidence in the record to support personal jurisdiction of the Court. Rather, in every case relied upon by Petitioners, it was already clear from the record that personal jurisdiction had been established, or from the evidence already in the record, personal jurisdiction could be found and was found by the various Courts. In this case, the District Judge never found personal jurisdiction, and every indication from the record is that personal jurisdiction should not lie in the Southern District of Texas. Therefore, certiorari need not be granted in this case to resolve a conflict between the decision below and this Court's decisions on discovery sanctions, but rather there is no such conflict. Certiorari should be denied.

IV.

CERTIORARI SHOULD BE DENIED, BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON JURISDICTION TO DETERMINE JURISDICTION IN ADMIRALTY CASES.

The present case was brought under the District Court's admiralty jurisdiction, 28 U.S.C. § 1333, and the Jones Act. Subject matter jurisdiction was never challenged by the defendant, but rather personal jurisdiction was challenged. The defendant never challenged the District Court's jurisdiction to determine whether this case fell

within its admiralty jurisdiction. As already pointed out in Respondent's second argument, the Jones Act, one of the bases of subject matter jurisdiction in this case, clearly provides for a forum which from the record is not the Southern District of Texas. Additionally, as already argued in Respondent's second argument, the general maritime law does not provide for a particular forum so that reference must be had to the Texas Long Arm Statute which the Fifth Circuit referred to in its decision below.

Petitioners seek to establish a conflict between the decision in the Court below and two cases which clearly deal with subject matter jurisdiction of a Court sitting in admiralty. The Petitioners first rely on *Swift & Company Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684 (1950). The issue in that case went to the very heart of admiralty jurisdiction. It involved whether or not a writ of foreign attachment on a vessel should have been vacated where the activities challenged by the plaintiffs seeking to impose the writ were non-maritime in nature. This Court explained the purpose of a writ of foreign attachment, *Swift & Co., supra* at 693:

> "The process of foreign attachment is known of old in the admiralty. It has two purposes: to secure a respondent's presence and to assure satisfaction in case the suit is successful. [Citation omitted]."

There was no question in *Swift* that the District Court had personal jurisdiction over the defendants, and needed only to determine whether or not a maritime remedy could be employed to right a non-maritime wrong. The decision in the Court below does not conflict or in any way undercut or circumvent the decision of *Swift & Co.*,

supra, because it is only a procedural issue and does not go to the subject matter of admiralty.

Petitioners also rely on the case of *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, rehearing den. 400 U.S. 856 (1970). In this case the issue was whether an alien resident owner was a Jones Act employer. No challenge was ever made to the Court's personal jurisdiction over the defendant owner, and it was clearly established that the defendant was operating in the United States with vessels calling at all of the various ports of the United States. The only issue to be decided was whether or not the defendant vessel owner was a Jones Act employer, a matter of subject matter jurisdiction, into which the Court could inquire. Since the Jones Act itself provides for the appropriate forum in which personal jurisdiction is established against a Jones Act employer, it is difficult to understand how there could be a conflict in the decision of the Court below which found that the Southern District of Texas was not the appropriate forum, and the decision of this Court in *Helle c Lines* which determined that a District Court could inquire as to the allegiance of a defendant owner to determine whether or not he was a Jones Act employer. The procedural test for personal jurisdiction is clear and unequivocal. The District Court failed to find personal jurisdiction and the record did not indicate any evidence of personal jurisdiction in the Southern District of Texas. There is no conflict between the decision in the Court below and the decisions in *Hellenic Lines, supra,* or *Swift & Company, supra,* cases in which personal jurisdiction was not an issue but rather the issue was the bounds of subject matter jurisdiction of admiralty. Therefore, certiorari should not be granted to resolve this non-existent conflict.

V.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE FIFTH CIRCUIT IN THE CASE BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN U.S. v. UNITED MINE WORKERS OF AMERICA.

The decision below is limited to reversing the entry of Default Judgment on the merits against the Defendants where the District Judge failed to find personal jurisdiction over the Defendants and where the evidence in the record failed to support a finding of personal jurisdiction. The Petitioners argue that this decision is in conflict with this Court's decision in *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). This alleged conflict simply does not exist. In *United Mine Workers, supra,* the Court only upheld a temporary restraining order designed to maintain the status quo in order to determine if it had subject matter jurisdiction over the case. It then punished the violation of that restraining order with criminal contempt. Personal jurisdiction had been established over the party cited for contempt. Personal jurisdiction was never established in the case now before this Court.

Petitioners also argue that there is a conflict within the Fifth Circuit itself between the holding in the case below and the Fifth Circuit's decision in *State of Florida v. Treasure Salvors,* 621 F.2d 1340 (5th Cir. 1980). Again, the cases are completely distinguishable. The Court in *Treasure Salvors, supra,* was faced with a challenge to its in rem jurisdiction and not to in personam jurisdiction. The Court then exercised its ancillary process over the res. The Fifth Circuit in its opinion in the case

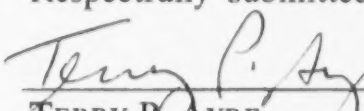
below held only that a default judgment could not be entered against the Defendants where the District Judge did not find jurisdiction over the persons of the Defendants.

Therefore the conflict perceived by Petitioners is non-existent, and the Petition should be denied.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in the case below was very strictly limited to a finding by the Court of Appeals that the District Court had not found personal jurisdiction over the defendants, and that the record did not establish or independently indicate any personal jurisdiction over the defendants. On this ground and this ground alone, the Fifth Circuit reversed the District Court's imposition of a default judgment on the merits of the case against the defendants. This very limited decision does not conflict with other cases in the various circuits imposing discovery sanctions for failure to comply with discovery on the merits of a case and imposing defaults or dismissals on recalcitrant parties. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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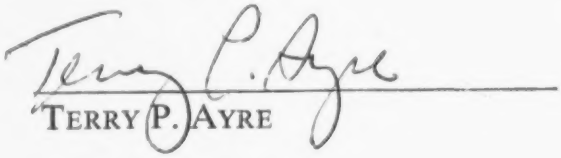
CERTIFICATE OF SERVICE

I hereby certify that pursuant to United States Supreme Court Rule 28.3, that all counsel of record herein have been served with three (3) copies each of this Opposition to the Petition by depositing the same in the United States mail, first class postage prepaid, properly addressed to counsel, at its post office address.



TERRY P. AYRE

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No. 80-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARIA EMILIA FAMILIA DE BOOM, ET AL.,
Petitioners,

versus

AROSA MERCANTIL, S.A., ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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No. 80-1322

IN THE
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OCTOBER TERM, 1980

MARIA EMILIA FAMILIA DE BOOM, ET AL.,
Petitioners,

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On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

I. Course Of Proceedings And Disposition Below

Respondents' opposition brief (p. 4) states that the district court did not act on defendants' Rule 12(b) motions to dismiss, omitting the following crucial information:

(1) The trial judge determined that these motions could not be decided until plaintiffs had the opportunity for adequate discovery of jurisdictional facts, and issued appropriate discovery orders.

(2) Before ordering jurisdiction discovery, the trial court satisfied itself that there was a reasonable basis for exploring plaintiffs' contention that permanent resident citizens and/or citizens of the United States were the equitable owners of defendant corporations and of the vessel.[1]

(3) Defendants' repeated violations of the court's discovery orders were, in the Fifth Circuit's view, "flagrant" and "contumacious."[2]

(4) The initial default against Arosa was "interlocutory," giving defendant the opportunity to cure it by coming forward with the requested information.[3]

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1 First Supp. Record, Vol. II, Tr. of Hearing of September 14, 1977, pp. 10-11; First Supp. Record, Vol. I, Tr. of Hearing of May 9, 1978, pp. 16-18.

2 Petition for Certiorari, p. 5a n.4, p. 10a, 629 F.2d at 1137 n. 4, 1139.

3 Petition for Certiorari, pp. 93a-94a.

Neither defendant ever purported to comply or to offer any justification for noncompliance.[4]

II. Statement Of Facts

Respondents significantly distort the present record when they claim that there was "no indication or no evidence to support personal jurisdiction" and that "every indication in the record was contrary to jurisdiction."[5] On the contrary, there *were* some record indications supportive of personal jurisdiction,[6] and the Fifth Circuit Court of Appeals determined only that the record failed to show sufficient contacts of defendants with Texas.[7]

III. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals As Well As With Other Decisions Of The Fifth Circuit.

Respondents' purported distinction of *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971), is disingenuous.[8] When a putatively foreign shipowner is sued

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4 Petition for Certiorari, pp. 94a, 97a-98a.

5 Opposition brief, pp. 7, 8.

6 See Petition for Certiorari, pp. 4-6.

7 Petition for Certiorari, pp. 9a-10a, 629 F.2d at 1138-39.

8 It is completely misleading to characterize *Lekkas* as a forum non conveniens case, see opposition brief p. 7. Defendant attacked the competency of U.S. courts and U.S. law under the Lauritzen v. Larsen line of decisions. See text and notes 15-18, *infra*. Nor is it apposite to state that "in *Lekkas* personal jurisdiction was clearly established." Opposition brief p. 8. The fact that defendant had an American agent was not of moment to the Court's reasoning. What *was* crucial was that, "[w]hen the [defendant] asked the court

in a United States court under the Jones Act and/or United States general maritime law, defendant may cast its challenge to the adjudication in the form of an argument based on personal jurisdiction,[9] subject matter jurisdiction,[10] the failure of the complaint to state a cause of action,[11] and/or a motion to decline jurisdiction.[12] Whatever the form of the challenge, the underlying issues are the same: defendant claims that United States courts and United States law cannot decide the matter because defendant and the cause-of-action-generating occurrence are foreign. To keep the case in the United States court, plaintiff must establish significant United States contacts under the factors laid down by this Court in *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306 (1970), and *Lauritzen v. Larsen*, 345 U.S. 571 (1953). Under those cases, a crucial fact is whether the ship is beneficially owned by American interests. That is what plaintiffs in the present case and in *Lekkas* were

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to decline jurisdiction, it subjected itself . . . to the obligation of furnishing . . . all pertinent information for decision of its motion." 443 F.2d at 11.

9 See Davis v. Asano Bussan Co., 212 F.2d 558 (5th Cir. 1954), holding the trial court erred in dismissing before defendants were required to respond to jurisdiction discovery.

10 See Hellenic Lines Limited v. Rhoditis, 412 F.2d 919, 921 (5th Cir. 1969), *aff'd*, 398 U.S. 306 (1970).

11 Lauritzen v. Larsen, 345 U.S. 571, 575 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354, 359 (1959).

12 In *Lekkas*, defendant moved the court to decline jurisdiction. In Blanco v. Carigulf Lines, 632 F.2d 656, 657 (5th Cir. 1980), defendant filed an alternate motion to decline jurisdiction or to dismiss for want of jurisdiction. Both cases stress plaintiffs' entitlement to discovery to meet the jurisdictional challenge.

trying to find out, and it is clear beyond cavil that plaintiff is entitled to such discovery to meet the defendant's challenge to jurisdiction,[13] as the Court of Appeals in the present case acknowledged.[14] *Lekkas* holds that "[i]f the defendants do not promptly and forthrightly disclose the facts necessary for decision of this issue, the district court should apply sanctions under Fed.R.Civ.P. 37, and for the purposes of this case, take as established that the ship is owned by American interests; or, if justice requires, *the court should enter a default judgment* on the issue of liability." (443 F.2d at 11, emphasis added.)

Lekkas is squarely at odds with the decision below, as the Fifth Circuit Court of Appeals itself acknowledged.[15]

* * *

Blanco v. Carigulf Lines, 632 F.2d 656 (5th Cir. 1980), decided since the present case, is inconsistent in principle with the decision below. Plaintiff sued a Belize shipowner under the Jones Act and general maritime law, and defendant filed an alternate motion to decline jurisdiction and/or dismiss for want of jurisdiction, accompanying that motion with the standard affidavit as was done in the present case. Holding that the trial court erred in dismissing for lack of jurisdiction before plaintiffs had the opportunity for full jurisdiction dis-

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13 See cases cited in Petition for Certiorari, p. 8 n. 7.

14 Petition for Certiorari p. 6a, 629 F.2d at 1137.

15 Petition for Certiorari pp. 10a-11a, 629 F.2d at 1139.

covery, the Fifth Circuit emphasized plaintiffs' right to jurisdiction discovery[16] and stated:

> [T]he district court dismissal for lack of jurisdiction was error. Plaintiff is not required to rely exclusively upon a defendant's affidavit for resolution of the jurisdictional issue where that defendant has failed to answer plaintiff's interrogatories specifically directed to that issue. *To hold otherwise would permit an advantage to a defendant who fails to comply with the rules of discovery.* 632 F.2d at 658; emphasis added.

The decision in the present case is inconsistent with *Blanco*, because, in denying to the district court the power to enforce discovery, the Fifth Circuit has emptied plaintiff's discovery right of meaningful content *and* has offered great advantage to defendants who refuse to comply with discovery. The observation in the opinion below that "[t]his [holding] leaves the district judge in a quandary in trying to enforce his discovery order"[17] drastically understates the matter.

Nor does it answer the situation to suggest, as does respondent's opposition brief,[18] that the present decision does not necessarily deny the district court power to enforce discovery orders but is somehow confined to

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16 632 F.2d at 657, citing Davis v. Asano Bussan Co., 212 F.2d 558 (5th Cir. 1954), in which the sole issue was plaintiff's discovery rights in the face of a challenge to personal jurisdiction.

17 Petition for Certiorari, p. 11a, 629 F.2d at 1139.

18 Opposition brief, p. 9.

these particular facts[19] and to the default sanction, as opposed to other facts and other discovery sanctions. The decision below clearly reaches all the F.R.C.P. 37(b) sanctions; if the district court cannot default defendants without first establishing personal jurisdiction, it surely cannot cure the "sovereignty"[20] problem by *deeming* personal jurisdiction present (and sovereignty thereby validly asserted).[21] Further, deeming personal jurisdiction present would not be an effective sanction in these cases, and restricting trial courts to that sanction would entirely defeat the general deterrence function of discovery sanctions,[22] for a defendant who has reason to believe that discovery would reveal suffi-

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19 The discussion below is plainly not restricted to "this particular case", as respondents' opposition brief asserts, p. 9. The Fifth Circuit did not reach the issue of whether default judgment was an abuse of the trial court's discretion in the choice of discovery sanctions. See Petition for Certiorari, pp. 2a, 6a, 629 F.2d at 1136, 1137-38.

20 Petition for Certiorari, p. 11a, 629 F.2d at 1139.

21 The discovery sanction of ordering that particular facts be deemed established is often tantamount to default judgment, and courts are not required to indulge in a formalistic two-step procedure when one step would achieve the same result. See 4A Moore's Federal Practice ¶ 37.03 [2.-3], p. 37-68, ¶ 37.03 [2.-5], pp. 37-83—37-84.

22 The importance of the most severe discovery sanctions to penalize defendant and to deter those who might be tempted to discovery recalcitrance was emphasized in the *National Hockey League* lines of cases, see Petition for Certiorari, pp. 21-22. For very recent expressions of that policy, see Liew v. Breen, 640 F.2d 1046, 1050 (9th Cir. 1981); Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1330-32 (9th Cir. 1981); Phillips v. Insurance Co. of N. America, 633 F.2d 1165, 1167-68 (5th Cir. 1981).

cient United States contacts would have every reason to resist discovery, since the worst sanction that could issue would leave defendant in exactly the same situation that would result from his meeting his discovery obligations. For such a defendant, there would be absolutely no reason not to chance the consequences of discovery recalcitrance.

* * *

The decision below is also inconsistent with *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979), *cert. den.*, 444 U.S. 832 (1979), in which the Court *deemed* personal jurisdiction established as a sanction for defendants' refusal to submit to jurisdiction discovery. Defendants' principal attack on the ensuing summary judgment of liability was that "[discovery] sanctions cannot be used to establish jurisdictional facts," 590 F.2d at 727. The Court termed that argument "meritless," pointing out that "[u]nlike subject matter jurisdiction, in personam jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver. [citations] The same principles give jurisdiction to the District Court to enter a sanction order. It is established beyond cavil that a court has jurisdiction to determine jurisdiction, and a party cannot hope to avoid the jurisdiction of a court by concealing evidence . . . ." 590 F.2d at 728 n. 5.

The *English* reasoning is fully apposite to the present case, and is not distinguishable on the basis suggested by respondents, opposition brief, p. 9. When the pres-

ent defendants filed their Rule 12(b) motions, they incurred the obligation of furnishing all pertinent jurisdictional information, see *Lekkas, supra;* when they refused to supply that information, defendants waived their objections to personal jurisdiction, see *English, supra.* Any other result is untenable; plaintiffs' discovery rights and the district court's own processes cannot be sacrificed in order to secure an advantage to defendants who abuse discovery, see *Blanco, supra.*

IV. The Court Below Erred In Holding That The U.S. Constitution Demands Compliance With State-Law Jurisdictional Requirements In This Admiralty Case.

The decision below was not based upon statutory grounds or limitations in the Federal Rules of Civil Procedure; the sole basis was the Court's view of "the limitations of sovereignty under due process,"[23] and it was *Texas* sovereignty that received analysis. Thus, much of the discussion in respondent's opposition brief, pp. 10-14, is unresponsive. The cases relied upon at pp. 14-21 of the Petition for Certiorari,[24] indicate at the least that, while the issue of the personal jurisdiction principles applicable to alien defendants in federal question and admiralty cases is the subject of present debate and uncertainty, there is clearly no *constitutional* impediment to considering such a defendant's contacts with

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23 Petition for Certiorari, p. 11a, 629 F.2d at 1139.

24 See also Pain v. United Technologies Corp., 637 F.2d 775, 780 (D.C. Cir. 1980), suggesting that the appropriate personal jurisdiction test is contacts with the United States.

the entire United States in declining a challenge to personal jurisdiction.

Plaintiffs therefore contend that the Court below erred in *assuming* that state-law and 14th Amendment jurisdictional principles controlled the issue of an admiralty court's power to enforce its discovery orders.

* * *

Respondent's opposition brief is seriously mistaken in implying that venue was an issue in the court below, p. 14, and in stating that the court below "found that the Southern District of Texas was not the appropriate forum," p. 19. Venue was not an issue. However, it should be pointed out that any legitimate concern that an alien defendant with United States contacts may lack sufficient contacts with the forum *state* is answered by the liberal availability of venue transfer under 28 U.S.C. §1404(a) and of the forum non conveniens doctrine. See *Alcoa Steamship Company, Inc. v. M/V Nordic Regent*, 636 F.2d 860, 866-67 (9th Cir. 1980) (en banc), pointing out that these doctrines had their earliest development in admiralty cases, precisely because of admiralty's liberal venue and personal jurisdictional principles. If the Southern District of Texas were indeed not the proper forum, there is ample power of that court to order the case transferred or to dismiss it on forum non conveniens grounds.[25] But those doctrines

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25 It is pertinent that a federal court lacking personal jurisdiction over the defendant nevertheless has the power to order the case transferred to a district where personal jurisdiction can be established. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962); Driscoll v. New Orleans Steamboat Co., 633 F.2d 1158, 1159 (5th Cir. 1981); Wright & Miller, Federal Practice and Procedure, §3827, p. 171.

cannot be sensibly tested when defendant refuses to comply with jurisdiction discovery.

V. Conclusion

Plaintiffs/petitioners reiterate all of the arguments of the Petition for Certiorari and point out that the foregoing rejoinder to respondents' brief opposing certiorari has been severely curtailed by page limitations.

Respectfully submitted,

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CERTIFICATE

I hereby certify, pursuant to United States Supreme Court Rule 28.3, that all counsel of record herein have been served with three copies each of this Petition by depositing same in the United States Mail, first class postage prepaid, properly addressed to counsel at his post office address.